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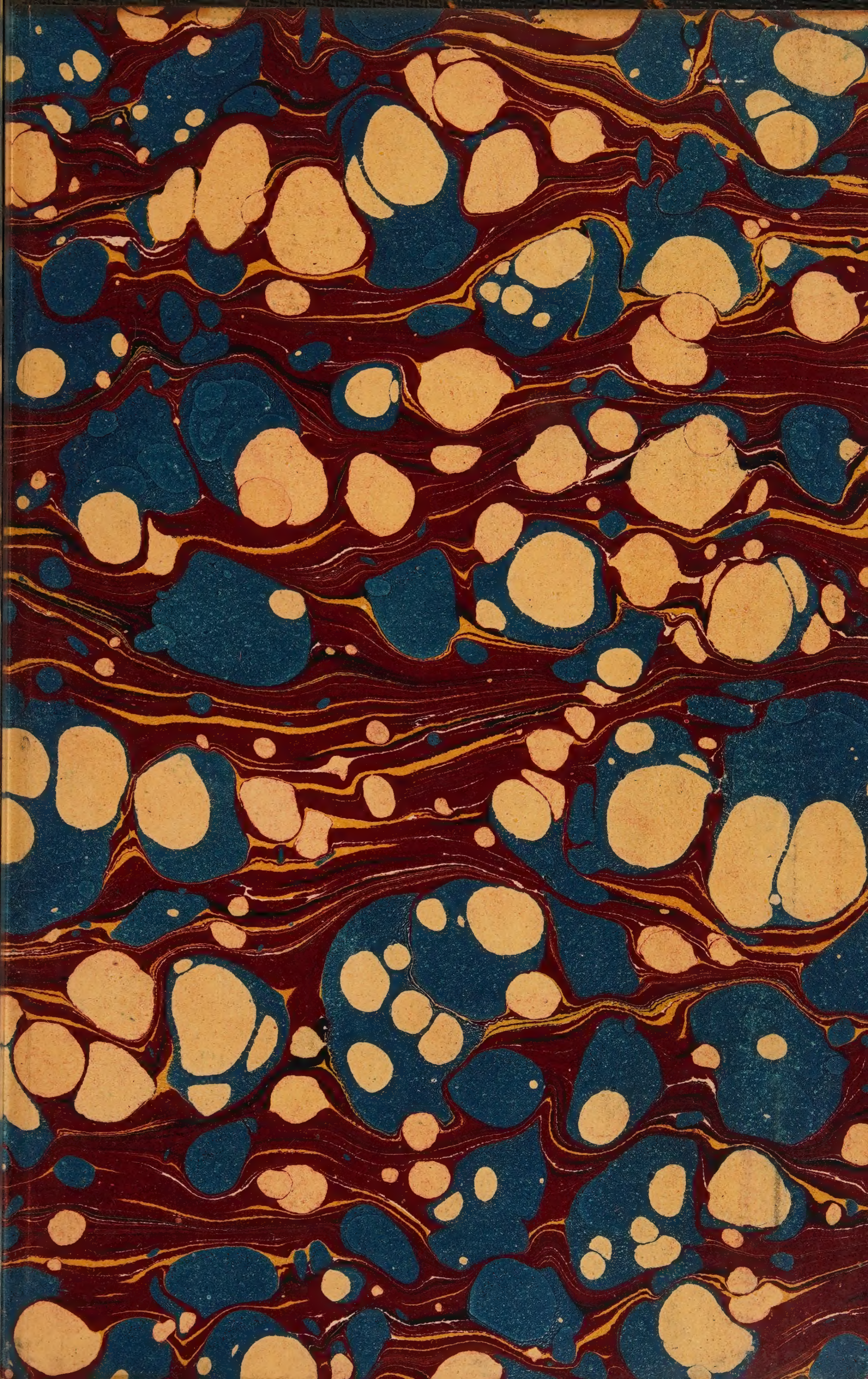

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AND

IN THE COURT OF APPEAL

BY
HENRY HOLROYD AND JOHN EDWARD HALL,
BARRISTERS-AT-LAW.

EDITED BY
JAMES REDFOORD BULWER, Q.C.

VOL. IV.

FROM MICHAELMAS SITTINGS, 1878, TO TRINITY SITTINGS, 1879,
BOTH INCLUSIVE.
XLII VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
1879.

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CASES

DETERMINED BY THE

COMMON PLEAS DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE COMMON PLEAS DIVISION

XLII VICTORIA.

BENT *v.* THE WAKEFIELD AND BARNSLEY UNION BANK.

1878
Nov. 25.

Reward for the Apprehension of a Felon—Criminal surrendering himself.

G. having been guilty of forgery, absconded. The defendants published a handbill offering a reward of 200*l.* "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G."

On the 30th of November, 1877, a person presented himself at the police-office, Exeter, and asked for the chief constable (the plaintiff). On seeing him, the man (who was G.) said, "You hold a warrant for me; I am wanted for forgery." The plaintiff left the man in a private room, and, on searching the police-gazette and finding a notice therein, "W. G. wanted for forgery," telegraphed to the superintendent of police at Dewsbury, "Do you hold warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., and should like him to be apprehended," the plaintiff *apprehended* and charged the man, who was ultimately convicted.

In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:—

Held, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice.

ACTION for 200*l.*, being a reward offered for the apprehension of one William Glover.

The cause was tried before Grove, J., at the last summer assize for Bristol. The material facts are set out in the judgment.

The case was heard on further consideration before Grove, J., on the 18th instant, when

A. Charles, Q.C. (*St. Aubyn* and *Austin*, with him), for the plaintiff, cited *Smith* v. *Moore* (1) and *England* v. *Davidson.* (2)

H. T. Cole, Q.C., and *Templer*, for the defendants, referred to *Lancaster* v. *Walsh* (3), *Thatcher* v. *England* (4), and *Cowles* v. *Dunbar.* (5)

A. Charles, Q.C., was heard in reply.

Cur. adv. vult.

Nov. 25. GROVE, J., delivered judgment.

This case was tried before me at Bristol at the last summer assize. It was an action for a reward of 200*l.* offered in a published handbill by the defendants, in the following terms:—

"200*l.* Whereas, on the 26th of June last, William Glover, shoddy and mungo dealer, of Ossett, absconded from Ossett, after committing various forgeries on several manufacturing firms in the West Riding of Yorkshire:

"Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police, Wakefield, as will lead to the apprehension of the said William Glover.

"West Riding Police Office, Wakefield, 27th July, 1877."

The plaintiff's case, on which my judgment must be founded, was, shortly stated, as follows:—On the 30th of November, 1877, a person presented himself at the police-office, Exeter, and on the plaintiff, the chief constable for Exeter, being sent for, the man, who was in fact Glover, said, according to the plaintiff's evidence, "You hold a warrant for me: I am wanted for forgery." The plaintiff asked his name and who he was. He said, "You know already, and hold the warrant." Some further conversation took place. The plaintiff said he appeared out of his mind, and told him he had been drinking, and recommended him to go to a hotel. The plaintiff left him in a private room, searched the police-gazette, and found the name "William Glover wanted for forgery." He got him to take off his hat, and said, "I satisfied myself, after reading the police-gazette, when he took his hat off." The plaintiff then telegraphed to Mr. Airton, superintendent at Dewsbury, "Do you hold warrant for the apprehension of William Glover for forgery?" and received a telegram in return, "I still hold warrant for Glover, and should like him to be apprehended." Upon that, the plaintiff apprehended and charged him; and he was ultimately convicted.

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(1) 1 C. B. 438.

(2) 11 Ad. & E. 856.

(3) 4 M. & W. 16.

(4) 3 C. B. 254.

(5) 2 C. & P. 565.

For the defendants evidence was given to prove that Glover gave his name before the telegram was sent; and also that he was taken into custody before it was sent. I left these two questions to the jury, and they found that Glover was not in custody before the telegrams; but could not agree, and, after being locked up, were discharged as to the first question,—counsel agreeing that they would accept the finding on the second for the purposes of the case.

The point reserved and argued before me on further consideration was, whether or not the plaintiff was entitled to the reward. For the plaintiff it was argued that he was the person to be taken to have given the information leading to the apprehension, within the meaning of the handbill. For the defendants, that the criminal, Glover, had given the information himself, and, secondly, that, on grounds of public policy, the plaintiff was not entitled to the reward.

I am of opinion that the defendants are entitled to judgment.

It was not contended that the mere fact of being the person who first communicated with Airton would be sufficient alone to entitle the plaintiff to succeed, supposing the information to have been given to the plaintiff by other than the criminal himself: indeed, the very able and learned counsel for the plaintiff said, in answer to me,—though I do not wish and ought not to tie him to his admission,—that, if Glover had given information to Airton, Airton would have been entitled to the reward. I think he could hardly have avoided such admission. Airton and Halls, it seems

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to me, are persons mentioned as proper to be communicated with, but if the information had been given direct to those offering the reward and had led to the apprehension, I should consider that sufficient. The criminal himself, and not the constable, was, I think, here the person who gave the information which led to the apprehension.

In *Lancaster* v. *Walsh* (1), where no person was named to receive the information, but the reward was to be given "on application to the defendant." Parke, B., says: "It seems to me that any communication to the constable whose duty it was to search for the offender was within the terms of the handbill, although there was no proof of a communication to the defendant himself." In the same case it is held by the same learned judge that "the party who first gave the information, and he alone, is to have the benefit." And Alderson, B., says: "Information means the communication of material facts for the first time."

It appears to me that in the present case the first information given to a person authorized to act was that given by the criminal himself; and although he, on grounds of public policy, might not be entitled to the reward, still, where a constable, who may apprehend a criminal (2), is the mere channel of communication, and only makes inquiries for the purpose of satisfying himself, he is not the person giving the information within the true meaning of the advertisement; the apprehension is not the consequence of the constable's information, but of the criminal surrendering himself to justice. To use the words of Tindal, C.J., in *Thatcher* v. *England* (3),—"the clue once found, the plaintiff in apprehending Walker did no more than his ordinary duty." It was argued that, in the case of *Thatcher* v. *England* (3), the first information was given by the criminal, and yet the person who communicated that information was held to be the party entitled. But there the communication by the criminal was not to any one authorized to act in apprehending or procuring his apprehension, but to a person whom seemingly he considered a friend, for the purpose of borrowing money to enable him to

(1) 4 M. & W. 16.

(2) Snowden on Constables, p. 152; Com. Dig. *Leet* (M. 9), (M. 10), *Justices of Peace* (B. 79).

(3) 3 C. B. 254, at p. 263.

go to London and dispose of the property stolen. The communication by the criminal there was not in the nature of information to be acted upon for the purpose of his apprehension, and, had the person to whom it was made kept the secret, would not have led to the conviction. In that case it was also held that, though the first police constable to whom the communication was made by his activity and perseverance succeeded in tracing and recovering nearly the whole of the property and in procuring evidence to convict the thief, he was not entitled to the reward.

The cases mainly relied on for the plaintiff were *England* v. *Davidson* (1) and *Smith* v. *Moore.* (2) The first of these cases bears more on the question of public policy than on the point to which I have hitherto adverted. It was there held, on demurrer, that the fact of the person giving the information being a constable did not necessarily disentitle him on the ground of want of consideration, it being his duty to discover and apprehend felons, or on grounds of public policy. In that case, the averments in the declaration were more general, viz. that the plaintiff did give such information as led to the conviction, and in the plea that the plaintiff was and is a constable of the district, and that it was his duty to give every information which might lead to the conviction, and to apprehend him. The short judgment of the Court, delivered by Lord Denman, is as follows:—"I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law unless the grounds for so deciding were very clear." All that that case decides is that a constable, as such, is not disentitled to a reward of this description, or necessarily disentitled as against public policy. In *Smith* v. *Moore* (2), the plaintiff, a police-constable then temporarily suspended, apprehended a burglar who after his apprehension voluntarily confessed: the constable was held entitled to the reward. There is in that case the obvious distinction from the present, that the confession was made after apprehension effected by the person claiming the reward, and who by his suspicions, and apprehending on the strength of them, had already done much, and in the judgment of the Court enough, to earn it.

(1) 11 Ad. & E. 856.

(2) 1 C. B. 438.

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BENT v. WAKEFIELD BANK.

On the question of public policy I am bound by the case of *England* v. *Davidson* (1) so far as the judgment in that case extends; and although there may be some distinction as to this point between that case and the present, yet, in deciding a case on the ground of public policy, the decision should be based on some broad principle, and one capable of general application.

I am unable to see any general principle other than that argued in *England* v. *Davidson* (1), viz. that a constable is bound by his duty, the duty of his office, to seek for criminals and to use his utmost efforts to bring them to justice. There are strong arguments of expediency, touching the administration of justice and the interests of the state, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an active search, by which delay the criminal might escape, or, in a case like the present, to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information, and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered to be inert in their efforts. But, although the judgment in *England* v. *Davidson* (1) does not enter upon these questions, I must assume they were present to the minds of the judges who decided that case.

Whatever my own opinion may be, it seems to me that I cannot without over-subtle refinement apply to this case any general principle of public policy which is not involved in that case, and that the decision, if it is to be reviewed, must be reviewed in a Court of Appeal. The first point is sufficient to decide this case; and I give judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Clarke, Rawlins, & Clarke, for H. D. Barton, Exeter.*

Solicitors for defendants: *Torr, Janeway, & Co., for Stewart & Son, Wakefield.*

(1) 11 Ad. & E. 856.

LOVELL *v.* NEWTON.

1878
Nov. 15.

21 ChD 659

Married Woman's Property Protection Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 1—"*Earnings*" *of Wife—Business carried on* "*separately*" *from the Husband.*

A., a butcher (not within the City of London), in consequence of confirmed intemperance, became incapable of continuing his business, and was removed to the workhouse infirmary suffering from delirium tremens. On his removal, a friend at various times lent his wife sums of money to enable her to purchase meat wherewith to carry on the business for the support of her family. She continued to do so for several months, her husband on his return from the infirmary never in any way interfering, but residing for part of the time in an upper room of the house. Meat which had been so purchased by the wife was seized in execution for a debt of the husband; and upon an interpleader summons the county court judge came to the conclusion,—whether as matter of law or of fact did not appear,—that the case was not within the Married Woman's Property Act, 1870. Upon appeal to a Divisional Court, it being agreed that the Court should draw inferences from the facts stated by the judge:—

Held, that the case disclosed such a separate trading by the wife as to warrant them in holding that the goods seized were the property of the wife.

APPEAL from the Shoreditch county court.

This was an interpleader issue to try whether certain stock-in-trade seized by the bailiff of the county court under an execution in an action brought by the plaintiff, Lovell, against William Newton, was at the time of the seizure the property of the execution debtor or the separate property of the claimant, Ann Elizabeth Newton, his wife. The evidence of the claimant, upon which the case turned, was as follows:—

"I am the claimant, the wife of William Newton, the defendant. Up to July, 1877, he carried on business as a butcher in High Street, Hoxton; but, becoming addicted to intemperance, he was subject to attacks of delirium tremens, and removed to the Hoxton workhouse. He did not leave me any stock or money. A friend (Mr. Garnham) lent me 70*l.* to carry on the business. On the 27th of July, 1877, I bought meat with it, and repaid it to him on the Sunday after. The profit was 6*l.* or 7*l.* I have carried on the business in the same manner by the assistance of Mr. Garnham and other friends up to the time of the execution. I live out of the profits, and support myself and six children. I pay the rent also. My husband came back, after he first went

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LOVELL v. NEWTON.

away, in fourteen days. In twenty-one days he was again attacked with delirium tremens, and again removed. In three weeks he again returned, and has remained with me ever since. He lies in bed all day, and gets up and goes out in the evening; but he does not interfere in the business; and my friends would not assist me if he did. I pay no interest for these advances, though I have offered to do so. [Mr. Garnham's cheques were produced.] The execution came in on the 16th of February last, and the stock of meat in the shop was seized. I had bought it with loans advanced, as before, by my friends. The execution came in for 52*l.* 4*s.* The meat seized was valued at 20*l.*, and Mr. Garnham lent me the money to pay out the execution."

On cross-examination, she said:—" I had a cart which I used in the business. My husband bought it; and I have used it since his illness. An action was brought against my husband by the plaintiff for injury done by this cart on the 9th of November last, when my foreman was driving in my business. Judgment passed against my husband. I instructed Mr. Pyke, a solicitor, to act for me; not for my husband, who was incapable. I handed the summons to him, and he appeared for the defendant in the action, who was my husband."

The judge of the county court was of opinion that the case did not fall within the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), and as a matter of form barred the claim, subject to the opinion of the Court above.

An order nisi having been obtained (at chambers) to enter judgment for the plaintiff,

J. Cook shewed cause. The judge of the county court was right in holding that the case did not fall within the Married Woman's Property Act, 1870. The 1st section of that Act provides that " the wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property." The 11th section, which may be referred to, does not seem to carry the matter any further. (1) The facts disclosed upon the judge's notes do not shew that the trade was carried on by the wife "separately from her husband" so as to exclude the presumption of agency and disable a creditor to sue him: *Smallpiece* v. *Dawes* (2); *Laporte* v. *Costick.* (3) The business never ceased to be his business, though he had in consequence of his intemperate habits discontinued to conduct it. At all events, it was a question for a jury. In *Ashworth* v. *Outram* (4) the business had been carried on by the wife, and the stock-in-trade which was seized had been acquired by her "earnings" before the marriage, and the husband had never in any way interfered with it. That, therefore, is a very different case from this.

Clay, contrà. *Ashworth* v. *Outram* (4) must govern this case. The wife was clearly carrying on the business for her own separate use apart from her husband. He was incapable of interfering, and he did not in fact interfere in its management. The persons who trusted her would not have done so if he had appeared in the business.

[LINDLEY, J. The business and the stock could only become the property of the wife with the assent of the husband; and here the husband seems to have been incapable of giving assent. In *Ashworth* v. *Outram* (4) there was abundant evidence that the goods claimed by the administratrix of the husband were the separate property of the wife, independently of the Act.]

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(1) Sect. 11 enacts that "a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property; and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof, for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property."

(2) 2 C. & P. 40.

(3) 31 L. T. 434.

(4) 5 Ch. D. 923.

Upon the construction of the Act the assent of the husband is immaterial. The inference and the only inference to be drawn from the admitted facts here is, that the stock-in-trade was the produce of the wife's earnings; and, if the Act protects the earnings, it must also protect the capital which produces them. The judgments of Lord Coleridge and Lord Justice James (1) are quite conclusive. In *Smallpiece* v. *Dawes* (2) there was no authority express or implied from the husband to the wife to carry on business so as to pledge his credit; and in *Laporte* v. *Costick* (3) it was found as a fact that the husband did exercise some control over the business.

[LINDLEY, J. In *Ashworth* v. *Outram*, Malins, V.C., says (4): "When the agreement [to the wife's carrying on the business on her own individual account] is made previously to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband but also binding upon his creditors. When the agreement originates during the marriage, it will be void against his creditors, but good against himself."]

DENMAN, J. Some difficulty has arisen in this case from the doubtful mode in which the county court judge has stated the facts, and his finding thereon. If the learned judge came to the conclusion that the case did not fall within the Married Woman's Property Act by reason of the fact of the husband living in the house, we should not be inclined to agree with him. The cases cited shew that that circumstance would not be sufficient to defeat the Act. But our difficulty is cleared away by the assent of the counsel to our deciding this appeal upon the facts as found, drawing all proper inferences from those facts, of course with regard to the decisions as to what is a separate trading of the wife within the meaning of the Act. Though in the judgments in the Court of Appeal in *Ashworth* v. *Outram* (5) the decision seems to have gone mainly upon the rights of the married woman apart from the statute, still Lord Coleridge in his judgment took a view which assists the claimant's case here. The question raised there was whether the stock-in-trade was part of the "earnings" of the wife; and he came to the conclusion that the Act could not be practically applied if stock-in-trade in a going concern were not within the protection of the Act. "What," he says, "is meant by a business, or a trade, or an occupation? I find it exceedingly well described, in language much better than I could use, in the case of *MacNeillie* v. *Acton* (1), the minutes in which I presume were drawn up by Sir George Turner himself. In that case the testator had directed that his trade should be carried on, and the question was what property was authorised to be employed for the purpose of carrying on that trade. I find in the minutes of the decree a declaration that, according to the true construction of the will of the testator, 'the testator's executors were not authorised or empowered to continue the trade or business in his will mentioned otherwise than with or by means of the property, capital, stock, and effects which were embarked and employed therein at the time of the death of the said testator,'—clearly implying, and in fact declaring, that to the extent of property, capital, stock, and effects which were embarked and employed in the business at the time of the death of the testator, the executors were permitted and justified in so using them. Then I may take it that, if the wages and earnings of a married woman are to be protected in an employment, the property, capital, stock, and effects embarked and employed in it at the time of the marriage, if they are allowed to be continued in the employment, and wages and earnings are allowed to be made therefrom, are protected by this section as necessary for the making such wages and earnings." And Lord Justice James agrees with him. We have, therefore, the opinions of two very learned judges that the stock used in the trade carried on as described in this case is within the Act. Then comes the question whether this business was separately carried on by the wife within s. 1. The facts are these:—The husband became addicted to intemperance to such an extent that, at the time the wife commenced carrying on the business on her own account, he had to be removed to the workhouse. After a short interval he recovered sufficiently to return to his home; but he relapsed into his evil habits, had a second attack of delirium tremens, and was again removed to the infirmary. On recovering from this second attack, he again went home, and though he remained in the house, he never interfered with the business in any way, but his wife continued to carry it on as before with money borrowed from time to time by her from her own friends. Under these circumstances, and upon this state of facts, I am of opinion that we are warranted in drawing the inference that the wife was carrying on this business separately from her husband within the spirit and meaning of the Act. If a jury had so found, no Court would have quarrelled with their finding. Looking at the substance and intention of the Act, which was to protect the fruits of the talent and industry of married women from being made liable for the debts of their husbands; and having a decision of the Court of Appeal that stock-in-trade is included within the term "earnings," I think we are fully justified, acting as a jury, in holding that Mrs. Newton was carrying on this business separately from her husband, so as to protect the goods in question from being seized for his debt. I wish it to be understood that the only *law* we decide is, that the mere fact of the husband living in the house at the time the business is so being carried on does not deprive the wife of the protection afforded her by the Act.

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(1) 5 Ch. D. at pp. 937, 941.

(2) 2 C. & P. 40.

(3) 31 L. T. 434.

(4) 5 Ch. D. at p. 932.

(5) 5 Ch. D. 937.

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(1) 4 D. M. & G. 744, 755.

LINDLEY, J. The case arises in this way:—Under an execution against the husband, the bailiff of the county court seized certain stock-in-trade (meat) which was claimed by the wife as being her separate property; and the question is whether under the circumstances she can assert a title to the meat separately from her husband. The facts are very meagre; and but for the smallness of the amount involved, I should have liked to send the case back to be more fully stated. Having regard to the condition of the husband, and seeing the sources from which the money whereby the wife was enabled to carry on the business came, that the husband's credit was in no way pledged for it, and that he had for a period of six months never interfered at all with the business, though he must have known that his wife was carrying it on with-

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LOVELL v. NEWTON.

out any assistance from him, I agree with my Brother Denman that we may fairly hold that the meat seized (I confine myself to that) was the property of the wife separately from her husband. It is not an immaterial fact that the money advanced to the wife was lent to her without interest. If the county court judge thought that the fact that the husband lived in the house at the time was conclusive of the question (as we are informed he did), I must say I should not have agreed with him. I arrive at this result because I think there is abundant evidence that the business was *for the time* the separate business of the wife.

Judgment for the claimant. (1)

Solicitors for plaintiff: *G. J. & P. Vanderpump.*
Solicitor for defendant: *Clement.*

WHITEMAN *v.* HAWKINS.

Nov. 15.

Solicitor, Action against, for Negligence—Measure of Damages—County Court Appeal—Entering Judgment on Appeal by Motion—13 & 14 *Vict.* c. 61, s. 14—38 & 39 *Vict.* c. 50, s. 6.

The plaintiff, who held a mortgage for 4600*l.* upon lands belonging to one F., agreed to make him a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the 46*l.*:—

Held, that this was negligence for which the defendant was liable; and that, in the absence of evidence to reduce the amount, the 46*l.* so paid was the proper measure of damages.

Upon an appeal by motion under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, the Court of Appeal has power to order *judgment* to be entered,—the former provision in that respect (13 & 14 Vict. c. 61, s. 14) not being repealed or varied by s. 6 of 38 & 39 Vict. c. 50, which only gives an additional mode of procedure.

APPEAL, by way of motion, from a decision of the judge of the county court of Northamptonshire holden at Thrapstone.

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(1) Leave to appeal was refused.

The facts appear more clearly by the following written judgment than by the notes taken by the learned judge at the trial.

The plaintiff sought in this case to make the defendant personally liable for negligence as his solicitor, on the following grounds, viz. that when, in the year 1876, he the plaintiff was applied to for a further sum of 400*l.* in addition to 4600*l.* then owing to him, with interest, by W. Foscutt on mortgage, he objected to make the further advance, as not being satisfied with the then existing security, and only agreed to do so on having a little piece of land, which had been bought by Foscutt of the devisees of one Parker, added to his security, and that he would not have advanced the further 400*l.* if he had been aware of a prior incumbrance on that land, of which he was kept in ignorance through the defendant's having omitted to obtain delivery of the title-deeds when Foscutt executed the new security.

These grounds, except as to the omission by the defendant to have the title-deeds delivered up, and the plaintiff's ignorance of the prior incumbrances, were not supported by the evidence. On the contrary, the plaintiff's letters shewed that he thought the security ample for the further advance without the addition of the little piece of land referred to (2 roods 8 perches), and that such addition was made at his own suggestion only on the ground apparently that it was not included in his former mortgages, and he might as well have all that Foscutt could give him. In a letter of the 27th of July, 1875, to the defendant, he (the plaintiff) says:—" I went over Mr. Foscutt's estate yesterday, and feel satisfied that the security is ample at the present. I am willing to advance him about 300*l.* more, to make the mortgage amount to 5000*l.* My advice was to him, Have sufficient to set you straight and pay your interest regularly as it comes due. Will you kindly inform me the outgoings upon it,—whether tithe-free. He says his sister has a charge of 300*l.*: that he states to be all. It would be much to his advantage either to let or sell his estate. I expect it consists of about 100 acres. Just state if that is correct. Is the little piece he bought of Parker included in the mortgage? If not, I think it should be." To this the defendant replied on the 2nd of August, 1875, so far as is material, as follows:—" The amount of your mortgage at present is 4600*l.*, and so 400*l.* (not 300*l.*) is required to make up the 5000*l.* Mr. Foscutt, however, has only asked for 300*l.*, which he wants this week. The land is about 100 acres in extent. The land in Ringstead (about 74 acres) is subject to tithe rent-charge, about 24*l.* a year. The little piece Foscutt bought of Parker's devisees shall be included. I am not aware of any other outgoings; but I think there must be some Nene drainage tax. But I will get particulars from Foscutt."

Under these circumstances 400*l.* was advanced by the plaintiff to Foscutt on the 9th of August, 1875, and was secured by a mortgage of that date from Foscutt to the plaintiff, prepared by the defendant, acting for both parties; and he witnessed Foscutt's execution of the deed, which included the little piece of land bought of Parker's devisees.

In the following year the plaintiff instructed the defendant to call in the mortgage and sell under the powers for that purpose contained in the mortgage deeds; and on the 10th of October, 1876, portions of the property (including the little piece of land bought of Parker's devisees, and mortgaged by the deed of 9th August, 1875) were sold for sums amounting to 1142*l.* 2*s.* 2*d.* Other parts were sold in the year 1877 for 1590*l.*; and the remainder is still unsold, having been bought in for 2800*l.*

On the occasion of the sales in October, 1876, it was discovered that one French had a charge, under a deposit of the title-deeds, on the little piece of land bought of Parker's devisees comprised in the mortgage of August, 1875, to the amount of 46*l.*, which the plaintiff was obliged to pay in order to get possession of the deeds relating to that piece of land. This sum, with 3*l.* 2*s.* for interest from the 13th of March, 1877, the date of the payment to French, amounting in all to 49*l.* 2*s.*, the plaintiff seeks to recover in this action from the defendant, by way of damages for his negligence in allowing the plaintiff to make the further advance of 400*l.* in August, 1875, on a defective security to the extent of French's equitable mortgage, and in not requiring the delivery of the title-deeds relating to the additional piece of land from Foscutt prior to such advance, which enabled him to conceal the charge to French.

Under the circumstances, I am of opinion that this is not such a case of *gross negligence* as would justify me in holding the defendant liable to this claim. The letter of the 27th of July, 1875, was calculated to lead the defendant to suppose that the additional security of the little piece of land therein suggested was of trifling importance, the security otherwise being, according to the plaintiff's statement, ample, and, further, to suppose that the plaintiff had himself ascertained that the only charge on the mortgaged property was the sister's 300*l.*, and that the little piece bought of Parker's devisees, and proposed incidentally in that letter to be included, was free from incumbrances, as Foscutt afterwards in the deed of August, 1875, covenanted that it was. It is to be observed that the then existing mortgage of 4600*l.* comprised sums advanced on ten different occasions by the plaintiff to Foscutt during a period of thirty-five yeears from April, 1840, the first advance being on the 24th of April, 1840, and that the plaintiff must have had repeated communications with Foscutt on the subject of those advances and the security for them; and that he was well acquainted with the property is shewn by his suggestion as to the land bought of Parker's devisees. No previous complaint had ever been made against the defendant, who acted in these several transactions.

No explanation, on the other hand, was given of how the defendant came not to require delivery of the title-deeds of the land bought of Parker's devisees, or why, when he ascertained at the plaintiff's request the outgoings on the land, he did not in the particulars he promised in his letter of the 2nd of August, 1875, to get from Foscutt as to the outgoings, include inquiries as to any incumbrance or charge on the land bought of Parker's devisees. It was, however, stated on the part of the plaintiff that there was no wish to impute to the defendant any knowledge of French's charge, or any wilful intention to mislead the plaintiff into advancing his money on a defective security, but only negligence in the conduct of the mortgage of the 9th August, 1875.

Supposing I should be justified, as I think I am, in holding that not to be *gross* negligence for which a solicitor may be personally liable to his client, the question of damages in this case still would raise a very serious difficulty. Foscutt, it appears, cannot be sued to any useful purpose on his covenant, though the evidence as to this was not conclusive, there being only evidence of an action against him for the whole mortgage debt, principal and interest, being abandoned as useless: but that would not prove it to be useless to sue him only for the amount claimed of the defendant.

Independently, however, of this, there was no evidence of the piece of land bought of Parker's devisees, and mortgaged by the deed of 9th August, 1875, having been sold at a loss, at less than 90*l.*, the price stated to have been paid for it by Foscutt to Parker's devisees, or the 46*l.* paid to French, or at less than its real value; no evidence, in fact, of the security of the 9th August, 1875, being an insufficient security to the extent of that piece of land notwithstanding French's charge. There was no evidence of how much of the 1142*l.* 2*s.* 2*d.* realised by the sales in October, 1876, was the price of this particular piece of land. It may have been sold for more than the 46*l.*, for more even than 90*l.* and the additional 46*l.*, for 140*l.*, or some sum near to that.

An account was put in, shewing a deficiency of 344*l.* 12*s.* to meet the whole debt, principal and interest; but it was not shewn how much of this deficiency was attributable, if any at all, to the piece of land in question; and the whole of this deficiency rests on the supposition that the remainder of the property not yet realised is worth only 2800*l.* There was no further evidence of this than its being brought in for that amount, which is evidence rather of its being worth more; and the plaintiff had himself more than once stated the whole property was worth more than 5000*l.*, and was ample security for that amount.

In *Chapman* v. *Chapman* (1), a suit instituted by a client against his solicitor for negligence, it being uncertain whether the plaintiff would sustain any loss, Vice-Chancellor Stuart, in deciding against him, said there was no precedent, so far as he knew, of a decree declaring generally that the plaintiff in such a case should be indemnified in respect of an apprehended loss, which might never occur. This principle was acted on by Vice-Chancellor Hall in the late case of *British Mutual Investment Co.* v. *Cobbold* (2), also a case against a solicitor for negligence in investigating a title, where, it being impossible then to say what loss (if any) the plaintiff company would sustain, the Vice-Chancellor allowed a demurrer to the bill, and said they must take their case to a Court of law. But I apprehend no specific damages can be recovered at law, in respect of only an apprehended loss, which may never occur; although it has been held that such an action is maintainable, though the damages be only nominal. This is not such an action. Special damages are asked in respect of a loss which is not proved to have occurred, and which may never occur. I know of no precedent for the recovery of damages in such a case; and my judgment must be for the defendant; but, as I think he was, in the absence of any sufficient explanation, wanting in due care in not requiring the title-deeds of the additional land comprised in the mortgage of August, 1875, to be delivered to the plaintiff, and the prior incumbrance to be paid off, I give no costs.

This judgment was pronounced on the 20th of March, 1878; and on the 8th of April, the following order was made by Field, J., at chambers, upon the application of the plaintiff, and upon reading the judge's notes:—"I do order that the defendant do at the next sitting of the Divisional Court, for hearing appeals from inferior courts, shew cause why the judgment for the defendant in this action should not be set aside, and the judgment entered for the plaintiff for the amount claimed, or a new trial granted, on the grounds,—first, that the judge of the Court was wrong in holding that, although the defendant was wanting in due care while acting as solicitor for the plaintiff, in not requiring the title-deeds of the additional piece of land mentioned in the particulars of claim to be delivered to him and the prior incumbrance to be paid off, yet the defendant was not liable to an action for negligence,—secondly, that, even if negligence were proved against the defendant, the plaintiff was not entitled to recover any damages from the defendant."

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(1) Law Rep. 9 Eq. 276. (2) Law Rep. 19 Eq. 627.

Nov. 15. *Channell* shewed cause. He contended that, upon the facts found, the judgment was perfectly correct, relying mainly upon the plaintiff's letter of the 27th of July, which, upon the authority of *Waine* v. *Kempster* (1), he submitted, absolved the defendant from making minute inquiries as to the sufficiency of the title. It was further contended that, until the whole of the securities had been realised, it was uncertain whether or not the plaintiff would sustain any loss, and consequently that he could only be at the most entitled to nominal damages.

Hensman, in support of the rule. *Godefroy* v. *Jay* (2) is an authority to shew that, where an attorney has been guilty of negligence as such, he is liable in damages to the extent of the injury sustained by his client; and that, if he relies upon the absence of actual damage, it is incumbent upon him to prove it. Here, the defendant was admittedly guilty of negligence in not possessing himself of the title-deeds of the piece of land bought of the devisees of Parker; and the plaintiff sustained damage to the extent of the 46*l.* paid to French in order to get possession of those title-deeds. The defendant offered no evidence: and for that sum the plaintiff is entitled to judgment.

[DENMAN, J. Have we power to enter judgment upon a motion in this form?]

[*Channell.* In the case of an appeal under 13 & 14 Vict. c. 61,

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(1) 1 F. & F. 695.

(2) 7 Bing. 413.

s. 14 (1), the Court has such power; but not under 38 & 39 Vict. c. 50, s. 6 (2), under which this order was obtained.]

Sect. 6 of 38 & 39 Vict. c. 50 merely gives a new mode of appealing from the decision of the county court. The Court of Appeal is still to do full justice between the parties, as in the case of an appeal under s. 14 of the former Act. Their power is in no degree abridged.

DENMAN, J. I am of opinion that Mr. Hensman has established his right to have the verdict entered for him for 46*l.* The case is one of a very peculiar character. I do not think it necessary, after the very elaborate judgment delivered by the county court judge, to go into the details. If his judgment turned upon any supposed distinction between different degrees of negligence,—if he thought that, to render the defendant liable to substantial damages, it was necessary to establish gross negligence as contradistinguished from a want of due care and attention to his business as a solicitor,—I think he was wrong. He appears to have come to the conclusion that the plaintiff could at the most be entitled to nominal damages. I cannot help thinking he did so upon the erroneous supposition that he could not give him more, on the ground that it was uncertain what damage the plaintiff had actually sustained. There appears to me to be no foundation for that. I think we have abundant materials before us to shew to what extent the plaintiff has been damnified by the admitted negligence of the defendant. The whole case was fully gone into, and the defendant offered no evidence to shew that the plaintiff had really sustained no damage. I apprehend it to be a sound principle of law, as against a wrongdoer, that, if negligence is proved, in the absence of evidence on the part of the defendant to reduce the damages, the plaintiff is entitled to recover the full amount of the pecuniary loss he has sustained. In *Featherston* v. *Wilkinson* (1), the defendants by charterparty agreed with the plaintiff that their ship should at a specified time load 1300 tons of coal in the Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had in consequence, first, to hire other vessels at an advanced freight, and, secondly, to buy 1300 tons of coal at an enhanced price. He was unable, according to the custom of the coal-trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in the price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre. It was held that the fact of the plaintiff having paid the advanced price was primâ facie evidence

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(1) 13 & 14 Vict. c. 61, s. 14, enacts that, "If either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of Common Law at Westminster," &c. "Provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, &c. And the said Court of Appeal may either order a new trial on such terms as it thinks fit, or *may order judgment to be entered for either party*, as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper: and such orders shall be final."

(2) 38 & 39 Vict. c. 50, s. 6, enacts that, "In any cause, suit, or proceeding other than a proceeding in bankruptcy tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, *by motion to the Court to which such appeal lies, instead of by special case*,—such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings, as to the Court to which such motion shall be made shall think fit: and if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers: And at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons; and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal."

See *Turner* v. *Great Western Ry. Co.* (2 Q. B. D. 125), and *Morgan* v. *Davies* (3 C. P. D. 260). See also Rules of Court of Hilary Sittings, 1877.

(1) Law Rep. 8 Ex. 122.

of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover. "The plaintiff," said Kelly, C.B., "made out a primâ facie case of damage, to which the defendants attempted no reply." So I say here. The principle,—or at least one part of it,—is, that the wrongdoer cannot be permitted to measure the damages resulting from his own wrong. I do not say that there is no conceivable evidence which might have been given here to modify the measure of damages. But I entirely assent to the argument of Mr. Hensman that it was for the defendant to offer such evidence. He did not do so: and he must abide by the case as the evidence stood at the trial. The judge ought to have given judgment for the plaintiff for the 46*l.*, and I think we ought to do so now.

With respect to our power to order judgment to be entered upon this order, it seems to stand thus:—Sect. 14 of 13 & 14 Vict. c. 61 gave the Court that power in the case of appeals under that section. That provision is still unrepealed, and consequently the power still exists, notwithstanding the new mode of procedure introduced by s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50); and I think it right to exercise it in this case. There will therefore be judgment for the plaintiff, with costs.

LINDLEY, J. I am of the same opinion. The plaintiff, being a mortgagee, and being asked to make a further advance, agreed to do so, and instructed his solicitor (the defendant) to get an additional small piece of land, which the mortgagor had acquired since the first mortgage, included in the new security. It was manifestly the duty of the defendant to see that this piece of land was unincumbered, and to get the title-deeds. In this he failed, and it turned out that this small piece was charged with an equitable mortgage to the extent of 46*l.*, and so became of less value to the plaintiff. The mortgaged property was subsequently sold in pursuance of the power contained in the mortgage deed; and, in order to effect that sale, the plaintiff was obliged to pay off the charge. Now, the defendant was clearly guilty of negligence of such a kind as to render him liable to an action. What, then, is the proper measure of damages? The plaintiff, having paid off the charge, is out of pocket to the extent of 46*l.* Primâ facie that is the proper measure of damages. It has been suggested that the plaintiff is not to be treated as having lost that sum, because the whole of the securities for the mortgage have not been realised. But, what right has the defendant to throw the plaintiff on the unsold land more than on the mortgagor personally? Upon the evidence as it stands, the plaintiff has been damnified to the extent of 46*l.*; and there was no proof to the contrary.

Judgment accordingly. (1)

Solicitor for plaintiff: *James Neal, for Wallingford, Day, & Wallingford, Huntingdon.*

Solicitors for defendant: *Milne, Riddle, & Mellor.*

HARGREAVES *v.* SCOTT AND ANOTHER.

Nov. 6.

Municipal Election Petition—Taxation of Costs—Master's Discretion.

The Court will not interfere with the discretion of the master as to the amount allowed for counsel's fees and refreshers, unless it be manifest that he has failed to exercise it in a reasonable manner.

THE petitioner having succeeded on his petition against the return of the respondents at the last election of town-councillors for the borough of Carlisle on the ground of treating; and the barrister who presided at the trial (in May last) having ordered the respondents to pay the costs of and incidental to the petition, a bill of costs was duly delivered. In this bill was charged a fee to the leading counsel with his brief of 105*l.*, and refresher fees of 25 guineas per day, and the usual consultation fees for each day the trial lasted, together with 27*l.* 10*s.* for travelling expenses; and to the junior counsel a fee with his brief of 35 guineas, refresher fees of 15 guineas per day, and consultation fees for each day, besides travelling expenses. The master on the taxation reduced the amount paid to the leading counsel to 30 guineas with the brief, and 15 guineas for refreshers, including a refresher fee for the first day of the trial; and the fees to the junior to 15 guineas with the brief and 10 guineas per day for refreshers.

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(1) Leave to appeal was refused.

The trial occupied five days, the brief contained about two hundred sheets, and there were one hundred and sixty witnesses examined.

Upon objection taken to these disallowances, the master certified that he had acted to the best of his discretion and according to the practice of the Court.

The petitioner took out a summons for a review of the taxation, which came on before Field, J., at chambers, when the learned judge made no order.

Day, Q.C. (*W. Hunter*, with him), appealed from the decision of Field, J. The taxation of costs under these petitions is provided for by the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 19, sub-s. 2, which enacts that "the costs may be taxed in the prescribed manner, but according to the same principles as costs between attorney and client in a suit in the High Court of Chancery." The "prescribed manner" is, by the master appointed by this Court for that purpose: see rule 55 of the General Rules of Michaelmas Term, 1872. The meaning of this, as explained by Bovill, C.J., in *Hill* v. *Peel* (1),—a case which arose under the Parliamentary Elections Act, 1868 (2), which contains a similar provision as to costs,—is, that the parties entitled to their costs under these orders are entitled to "an indemnity for all costs that are reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution or over anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth, or character of either of the parties, or any special desire on his part to insure success." The learned judge goes on to say: "We think also that such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed." In the *Southampton Case*, which was grouped with other two cases in the judgment in *Hill* v. *Peel* (3), the brief it is said, "was very voluminous (320 sheets), and contained instructions for the examination of eighty-five witnesses on behalf of the respondent. The leading counsel received with his brief 200 guineas, and 50 guineas each day for refreshers besides consultation fees; the master allowed only 100 guineas with the brief, and 25 guineas each day for refreshers, to include consultation fees. The junior counsel received 150 guineas with his brief, and 30 guineas each day for refreshers, besides consultation fees; the master allowed only 75 guineas with the brief, and 15 guineas each day for refreshers, to include consultation fees." In this case Bovill, C.J., says: "The *Southampton Case* appears to us to stand upon a somewhat different footing. The master seems to have allowed the fees in that case rather as in accordance with a general rule than upon a due consideration of the circumstances of the particular case; and, looking to the affidavits and voluminous briefs in that particular case, we think it will be more satisfactory that the case should be re-considered by him, and upon the principles which we have laid down." (1) Seeing the distance of Carlisle from London, was it reasonable to expect that counsel of eminence could be induced to go so far at a time when the Courts were all sitting in London, for a smaller fee than 100 guineas? No reason is assigned by the master for the reduction; and there cannot be a rigid and hard-and-fast rule upon such a subject; each case must depend upon its own peculiar circumstances.

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(1) Law Rep. 5 C. P. 172, 180.

(2) 31 & 32 Vict. c. 125, s. 41.

(3) Law Rep. 5 C. P. 174, 181.

Willis, Q.C. (*F. Turner,* with him) shewed cause. *Tillett* v. *Stracey* (2) shews that the discretion of the master, as to the amount to be allowed for counsel's fees in these cases, will only be reviewed by the Court where the master has manifestly exercised it in a manner which is obviously erroneous or unreasonable, or has failed to exercise it at all. Nothing of the kind appears here. The master has certified that, acting upon the ordinary rule in these cases, he in the exercise of his discretion considered the fees which he allowed were reasonably sufficient. And, when it is considered that the only matter to be tried was whether or not certain voters had been bribed by means of a few glasses of drink, it can hardly be thought that the case required the services of "eminent counsel," or that talent enough could not be found at the local bar. It is not because the appellant so highly esteems municipal honours, as to be willing to incur extravagant expenses to obtain a seat, that the respondents should be called upon to suffer so great an infliction. It is to be observed that the refresher fee of 15 guineas was allowed for the *first* day, and therefore the actual fees on the briefs were 45 guineas and 25 guineas respectively.

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(1) Upon a review the master did in this case slightly increase the allowance for counsels' fees.

(2) Law Rep. 5 C. P. 185.

GROVE, J. I see no reason for interfering with the discretion of the master in this case, sanctioned as it has been by a learned judge. No strict rule can be laid down in these cases; each must necessarily depend upon its own circumstances. In many of these cases, as well as in cases arising in county courts or revising courts, serious questions may no doubt arise. But in all cases, whether of parliamentary or municipal election petitions, what we have to inquire into is whether or not the discretion of the master has been exercised reasonably. In the particular case I do not see that the master has been so wrong as to warrant us in interfering. If I had been asked what would in my judgment be the proper fees to allow for the leading counsel in such a case as this, I should have said, as at present advised, 50 guineas on the brief and 15 guineas for refreshers, with proper consultation fees. This is pretty much what has been allowed; for, I never heard of a "refresher fee" for the first day of a trial. I do not understand the master to certify that he felt himself bound by any hard-and-fast rule; but that he looked at the general practice, and exercised his discretion in a manner which he conceived to be in accordance with it. I think this motion should be dismissed with costs.

DENMAN, J. I am of the same opinion. I see no ground for saying that the master has failed to exercise his discretion in a perfectly reasonable manner.

Motion dismissed.

Solicitors for appellant: *Matthews & Greetham.*
Solicitor for respondents: *W. Hunter.*

STOKES *v.* GRANT AND OTHERS.

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Nov. 25.

5 PD 55

Pleading — Matters of Law — Embarrassing — Order XXVII., Rule 1 — Striking out.

Statements in pleading which are not demurrers, but allege only matters of law that might be raised by demurrer, are embarrassing, and may be struck out under Order XXVII., Rule 1. WN (1878) p 211 35.

Motion to reverse or vary a decision by Lush, J., at chambers, affirming a Master's order that certain paragraphs should be struck out of a statement of defence, with leave to substitute demurrers instead thereof.

Action by the plaintiffs as executors of Thomas Wedgwood Walton against the defendants as promoters, directors, and officers of the Emma Silver Mining Company, for knowingly issuing a prospectus containing false and fraudulent statements and omissions, and not specifying certain contracts according to the Companies Act, 1867 (30 & 31 Vict. c. 131, s. 38), whereby the plaintiff's testator was induced to take shares in the company and damaged.

The Statement of Claim set out the transactions which were alleged to give rise to the cause of action.

The Defence of the defendant Grant, after certain denials and admissions of facts stated in the Claim, proceeded thus:

Paragraph 16. "And the said defendant will further contend that the statement of claim, so far as relates to the shares alleged to have been subscribed for on the 14th of November, 1871, is bad in law, and shews no cause of action against the said defendant, on the ground that all the damages sued for therein in respect of such shares are shewn to have proceeded from the independent wrongful acts and defaults of parties other than the said defendant, which acts and default he is not shewn to have been connected with or answerable for in any wise whatever."

Paragraph 41. "The said defendant further says that even if the said testator would have had in his lifetime a good cause of action against the said defendant in respect of the matters alleged in the statement of claim (which the said defendant denied) the said cause of action did not survive to his executors upon his death, and that even if the plaintiffs are in fact the executors of the said testator, they have no right or title to maintain this action."

These and other paragraphs having been struck out under Order XXVII., Rule 1, the defendant appealed.

Moulton, for the defendant Grant, in support of his motion. The defendant wishes to raise at the trial a question of law on the plaintiff's statement of claim, but is not bound to demur to it. Nevertheless he must "raise all such grounds of defence as if not raised on the pleadings would be likely to take the opposite party by surprise:" Order XIX., Rule 18. Therefore he has alleged his points of law that the plaintiffs may have notice. This is an advantage to them, and no cause of embarrassment or objection. The paragraphs should therefore be allowed.

Mackenzie (*C. E. Bowen* with him), for the plaintiffs, shewed cause. First, the paragraphs are demurrers and should be struck out, as no leave has been obtained under Order XVIII., Rule 5, to plead as well as demur.

[GROVE, J. Rule 4 of the Order directs that a defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer or defence in one pleading.]

Rule 4 merely relates to the form in which the defence shall be written or printed in order that, for the sake of convenience, the plea and demurrer may be on the same sheets of paper, but does not allow them to be joined without leave.

Secondly, if not demurrers, the paragraphs are pleas containing matters not of fact but of law, and are embarrassing.

[LINDLEY, J. How? They give you, it is said, friendly notice, and seem to me no more than useless.]

Issue cannot be joined on them, nor can they safely be treated as demurrers and entered for argument. They encumber the pleadings, which should be concise statements of fact: Order XIX., Rule 4. The learned judge at chambers has, in his discretion, deemed them embarrassing, and struck them out. The Court will not readily interfere: *Watson* v. *Rodwell* (1).

Moulton, in reply.

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(1) 3 Ch. D. 380.

Grove, J. I am of opinion that the order of Lush, J., was right. Paragraphs 16 & 41 appear to me embarrassing, for I think that such allegations may be so if the learned counsel for the opposite party can hardly know what to do with them. They expose him to risk; he cannot demur, or thinks that he cannot, and cannot take issue on them. Yet if he disregards them, and the action goes to trial, the defendant may then say that these statements were made, and the plaintiff left them unanswered. It would be impossible to say what effect that might not have on the mind of a jury, and even of a judge. Paragraph 16, although not a demurrer in formal terms, looks to me very like a demurrer. Whether it could be safely entered for argument as such, I do not say. It alleges that the damages proceed from acts and defaults which the defendant is "not shewn" to have been connected with; whether "not shewn" means not shewn in the statement of claim or otherwise, issues taken on that paragraph would not be on facts, but on the allegation that the statement of claim is bad in law. I should be much embarrassed in pleading to this paragraph to know whether I should deny it generally, or treat it as a demurrer, or disregard it. It seems to me embarrassing, and embarrassing if only useless, for I think that if the record is to be taken with such statements, pleading, instead of being made more clear and concise under the Judicature Act, would become more vicious and a mere farrago of useless informal allegations, very perplexing at the trial. In paragraph 41 there is an allegation of a contingent point of law—not an absolute assertion that the statement of claim is bad in law—but that if some alleged fact does or does not exist, there is a good defence. Were this allowed, forty paragraphs of such contingencies might be put in—that if something be proved at the trial, the defendant has a good answer at law. Of course he has a good defence, and knows it well, if the plaintiff does not make out his claim. Why conditional matters of law should be pleaded, or parties put to the trouble and expense of preparing evidence to meet a case perhaps never raised, and to unnecessary costs at the trial, I fail to see.

Lindley, J. The power to strike out statements is conferred

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by Order XXVII., Rule 1, and it is necessary to have regard to the language of that rule before exercising the power. [His Lordship read it.] My Brothers Lush and Grove think paragraphs 16 and 41 embarrassing. It is a matter of discretion to decide whether they are embarrassing or not. I should not have been embarrassed by them, because I am accustomed to such allegations. I should have taken no notice of them, and have declined to demur. Order XIX., Rule 18, is relied on by Mr. Moulton, who says that these statements serve to give notice to the plaintiff of points to be raised, but I cannot see the object of giving such notice. If the defendant wants to avail himself of them in a summary way, he must demur; but if he does not demur, he does not waive the objection, and may say at the trial that the claim is bad on the face of it. These paragraphs are utterly useless, serve no good purpose, and are considered embarrassing by learned judges of greater experience than myself of trial by jury, moreover, we have the authority of the Appeal Court to say that striking out pleadings is a matter of discretion, and, therefore, although I might, in the first instance, have let the paragraphs stand, I cannot say they are not embarrassing; and I think that the order of Lush, J., should be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Snell & Greenip.*
Solicitors for defendants: *Lewis & Lewis.*

✓ Nov. 12.

MACDONALD v. CARINGTON.

Pleading—Claim in Plaintiff's own right—Counter-claims against him personally and as an Executor—Joinder of improper—Order XVII., Rule 5—Order XIX., Rule 3—Order XXII., Rule 9. WR (D) 51 CPD 350,

PD 75
CLD 803-4

A defendant must not set up by way of counter-claim against the claim of a plaintiff, suing only in a distinct personal character, claims against him personally and also as an executor.

MOTION on appeal from the decision of Field, J., at chambers, affirming the refusal by a Master to strike out the counter-claim.

The CLAIM alleged that: The plaintiff was the widow of

Godfrey William Wentworth Lord Macdonald, and the defendant was the widow of Robert John Lord Carington.

By an indenture of lease dated the 10th of May, 1856, and made between two trustees of the first part, the plaintiff of the second part, Lord Macdonald of the third part, and Lord Carington of the fourth part, certain hereditaments were leased by the trustees under a power given them by therein recited indentures of the 20th of August, 1845, and 20th of October, 1849, and 15th of January, 1854, with the consent of the plaintiff to Lord Carington, his executors or assigns, for the term of twenty-one years from the 25th of March, 1856, at a yearly rent.

By the lease Lord Carington, for himself, his executors and assigns, covenanted with the trustees and the person or persons for the time being entitled to the premises thereby demised in possession, that he Lord Carington, his executors or assigns, would, inter alia, repair the hereditaments.

5. By the indentures of 1845, 1849, and 1854, the hereditaments were settled to the use of the trustees during the joint lives of Lord Macdonald and the plaintiff, in trust to pay the rents and profits thereof, for the separate use of the plaintiff, and as to one moiety to the use of Lord Macdonald for his life, and as to the other moiety to the use of the plaintiff for life.

Lord Macdonald died on the 25th of July, 1863.

7. The plaintiff was the person for the time being entitled in possession to the premises demised by the indenture of the 10th of May, 1856, within the meaning of the covenants of the indenture.

Lord Carington entered and possessed the demised premises for the term, and afterwards died on the 17th of March, 1868, and his will was proved by the defendant, and all his estate and interest in the premises vested by assignment in the defendant, who entered into and became possessed thereof for the residue of the term.

9. The term had expired, and all conditions had been fulfilled by the plaintiff necessary to entitle her to the performance of the covenants in the lease, yet Lord Carington did not during his life, and since his death the defendant had not, repaired the premises.

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The plaintiff claimed 5500*l.* damages for the breaches of the covenants, as well from the defendant as executrix of Lord Carington as from her in respect of her own default.

The DEFENCE admitted the execution of the lease and denied paragraphs 5, 7, and 9.

The SET-OFF and COUNTER-CLAIM alleged that: The plaintiff was sole executrix of the will of Lord Macdonald.

At the time of the lease of the 10th of May, 1856, the demised premises were in the possession of Lord Macdonald, but neither the plaintiff nor Lord Macdonald then had any right, title, or interest thereto, nor had they, nor either of them, ever had any title thereto, save such as thereinafter appeared.

Prior to and at the date of his death in 1830, one George Thomas Wyndham was tenant for life of the demised premises, with remainder to his sons successively in tail male, with remainders to the daughters of one George Wyndham in tail as tenants in common.

In 1830 George Thomas Wyndham died intestate, leaving an only son and two daughters. The son died at the age of eight years, in February, 1837.

On the death of the son all right, title, and interest in and to the premises vested in the daughters in tail as tenants in common, and remained so vested in them until their right was barred by the Statute of Limitations, as thereinafter appeared.

Prior to and at the date of the lease of the 10th of May, 1856, Lord Macdonald was wrongfully and without right in possession of the premises, and negotiations had taken place between Lord Macdonald, the plaintiff, and Lord Carington, for the purchase by Lord Carington from the plaintiff or Lord Macdonald, of the fee simple of the demised premises. Owing to the matters before set forth, the plaintiff and Lord Macdonald were unable to make a good title to the premises.

It was thereupon agreed by and between Lord Carington and Lord Macdonald, with the sanction and agreement of the plaintiff that the premises should be demised to Lord Carington by the lease of the 10th of May, 1856, and that Lord Macdonald should further execute the deed next mentioned.

An indenture of the 10th of May, 1856, was executed by and between Lord Macdonald and Lord Carington, which after reciting the lease bearing even date, contained the following covenants:

(a.) That if Lord Carington, his executors, administrators, or assigns, should during the term or within six months afterwards, be desirous of becoming the purchaser or purchasers of the hereditaments in fee simple at the price of 100,000*l.*, and should give to the person or persons for the time being entitled to the premises in possession subject to the term, notice thereof, then he, Lord Carington, his executors, administrators, or assigns, should be entitled to become the purchaser or purchasers of the same at that sum, and in case Lord Carington should pay the said sum then all necessary and proper parties would and should at any time after, on request, convey the inheritance in fee simple to him, or as he should direct.

(b.) That if Lord Carington, his executors, administrators, or assigns, should become the purchaser or purchasers, it should be assumed that George Thomas Wyndham, who was born several months after the death of George Wrighte (through whose will the said hereditaments were claimed), was not by construction of law or otherwise, living at the decease of George Wrighte. And the title should commence with a settlement of 1767.

On the death of Lord Carington, his whole benefit in the covenants and the right to sue for breaches after mentioned, vested in the defendant either in her own right or as his executrix.

Lord Macdonald during his lifetime, or in the alternative, the plaintiff since his decease, had acquired a good title to the fee simple of the demised premises as against the real owners thereof by virtue of the statute 3 & 4 Wm. 4, c. 27.

The plaintiff was a person claiming and deriving title through Lord Macdonald, within the meaning of the said covenants.

Lord Carington before his death, and the defendant as executrix since his death, during the continuance of the term, and the defendant within six months after the expiration of the term were, and each of them was desirous of becoming the purchaser of the demised premises.

All things had been done necessary to entitle Lord Carington in his lifetime, and the defendant since his decease, to the fulfilment of the covenants by the plaintiff.

Before any breach by the defendant, or Lord Carington, of their part of the agreement contained in the said indenture, the plaintiff wrongfully refused to be bound by the said covenants.

The necessary parties would not convey the fee simple.

The plaintiff did not, nor would she at the request and cost of the defendant, as such executrix as aforesaid, do or concur in such acts as were necessary on the plaintiff's part for effectually conveying the fee simple.

Between the date of the execution of the indenture containing the covenants and the breaches before set forth, Lord Carington and the defendant as executrix, had, with the knowledge of Lord Macdonald and of the plaintiff, intended to expend and had expended a large sum of money, upwards of 70,000*l.*, on the faith of the performance by the plaintiff of the said covenants.

At the time of the making of the indenture, Lord Carington had informed the plaintiff and Lord Macdonald of his desire and intention that such sum should be so expended, and the indenture was intended by the plaintiff, Lord Macdonald, and Lord Carington, to protect Lord Carington and his estate from losing the benefit of such expenditure.

The defendant had been unable to obtain a conveyance of the reversion, and had lost the benefits of the covenants and expenditure.

Even if the title of the plaintiff were not as therein before alleged, but as alleged in the statement of claim, the defendant was entitled to have the covenants performed, and the plaintiff had been guilty of the above breaches, and was liable to make good the above damages.

And the defendant in her own right, or in the alternative as executrix, claimed to set-off against the plaintiff's claim, if any, so much of the damages caused by the said breaches of covenant as might be equal thereto, and further counterclaimed against the plaintiff either as executrix of Lord Macdonald or otherwise, 80,000*l.* damages and interest, and further relief.

Mellor, Q.C., and *R. Russell Griffiths,* for the plaintiff. The plaintiff sues in her own right of property. She is tenant for life, bringing an action for breaches of covenant in a lease: *Isherwood* v. *Oldknow.* (1) But the counter-claim is against her as executrix of her late husband, for it is founded on breaches by him of a personal covenant in respect of which she would only be liable as executrix. Counter-claims are provided for by Order XIX., Rule 3, but they must be such as can be adjudicated upon together with the claim in one final judgment: see *Blake* v. *Appleyard.* (2) Here the judgments might be quite of a different kind, such as for the plaintiff a certain sum, and for the defendant assets in futuro. If in the opinion of the Court the counter-claims cannot be conveniently disposed of in the pending action, or ought not to be allowed, the Court may refuse permission to the defendant to avail herself thereof. The defendant is attempting to raise a doubtful question of title, which may lead to long litigation, and "ought not to be disposed of by way of counter-claim, but in an independent action," and should therefore be excluded under Order XXII., Rule 9. By Order XVII., Rule 5: "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

[LINDLEY, J. When is it that the "defendant sues"?]

The words "sues" and "is sued" must be read with reference to the words "plaintiff" and "defendant," reddendo singula singulis. Assuming that the Rule includes counter-claims, which is doubtful, it does not apply to the present case, but was intended to remove difficulties arising when an executor has been dealing with the assets, or making contracts in the course of the administration, and it becomes a question whether the contracts, being personally entered into by him, he should be sued in his character of legal personal representative, or in his personal character: see per Hall, V.C., *Padwick* v. *Scott.* (3) Although under the Judicature Act and Rules, nearly all causes of action may be joined, yet an executor cannot join any but those arising "with reference to the estate." In *Hodson* v. *Mochi* (4), which will be cited for the defendant, the counter-claims against the executors, who were plaintiffs, did not charge them personally.

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(1) 3 M. & S. 382.

(2) 3 Ex. D. 195, at p. 197.

(3) 2 Ch. D. 736, at p. 743.

(4) 8 Ch. D. 569.

C. E. Bowen, for the defendant. The counter-claim is in substance a claim against the plaintiff in her personal character, and was deemed to be so by Field, J., at chambers. The plaintiff may be tenant for life and entitled to the benefit of the covenants, or may be tenant in fee simple, but in either case the defendant has a right against her personally arising out of the expenditure on the land with her knowledge and on the faith of the performance of the covenants. She is also liable as executrix, and the defendant should not be restricted to one view of facts which the law may regard differently. The counter-claim is not vitiated simply because a double liability appears in it. The defendant may avail herself of the alternative. The plaintiff is allowed to join several causes of action and to sue the defendant as one liable both personally and as executrix, and the defendant has a reciprocal right of counter-claim. If the rules allow a third party to be brought into the dispute, the first litigant may surely be dealt with in a double character. It is desirable that both causes of counter-claim should be determined together, according to the spirit of the Judicature Act. By Order XIX., Rule 3, the defendant may set up by way of counter-claim "any right," as in a cross action. The Court could "pronounce a final judgment" here, and the rule does not require that the judgment should necessarily be of the same kind, but only that it should settle the whole case. Suppose the two causes of counter-claim were debt and detinue, the judgment would necessarily be different in kind, but those causes could undoubtedly be joined and "final judgment" be given. There is no ground for saying that this "counter-claim cannot be conveniently disposed of in the pending action," within the terms of the above rule.

In *Hodson* v. *Mochi* (1) executors brought an action against a wife and her husband to charge her separate estate. The defendants counter-claimed money belonging to the wife not part of her separate estate, and also for chattels in the possession of the testator, which were alleged to be the property of the husband, and the counter-claim was held good.

(1) 8 Ch. D. 569.

Order XVII., Rule 5, applies to counter-claims, as Hall, V.C., assumed in *Padwick* v. *Scott.* (1)

Any embarrassment resulting from the questions of law raised by the pleadings is common to both parties. The plaintiff can as easily reply to a counter-claim as plead to the claim in a cross action, which must be brought against her if the counter-claim is disallowed. But should the opinion of the Court be now adverse to the defendant, the counter-claim shall be amended by striking out so much as charges the plaintiff in her executorial character.

Mellor, Q.C., replied. The equitable counter-claim against the plaintiff in her personal character, on the ground that she stood by while money was expended in improvements, is faint. The real claim is against her as executrix. A counter-claim is not co-extensive with a claim; it is rather in the nature of a set-off allowed so that one final judgment may be given for a balance of debt or damages due from either plaintiff or defendant, as the case may be: see *Staples* v. *Young.* (2) The counter-claim, if amended, must be deemed to be a new one, to which the plaintiff may demur if necessary.

DENMAN, J. My mind has fluctuated considerably during the argument. To put the case most favourably to the defendant we must read Order XIX., Rule 3 before Order XVII., Rule 5, and when this is done it might at first sight be fairly contended that, inasmuch as Order XIX., Rule 3 says a "set-off or counter-claim shall have the same effect as a statement of claim in a cross action," if Order XVII., Rule 5 immediately followed as part of the same set of enactments the provision in it, that "claims by or against an executor or administrator as such may be joined with claims by or against him personally," would include counter-claims as well as claims. But I do not think that such was the intention of these Orders and Rules. There might be good reason for enabling an executor or administrator, or a plaintiff, doubtful whether his claim should be made in his personal or representative character, to sue in the alternative without the result that, in case of counter-claims against an executor who is evidently suing in his own right, the defendant should be entitled to set off any cause of action which he may have against the plaintiff in his two capacities. Stronger arguments or authorities than those adduced to-day are needed to convince us that the word "claims" in Order XVII., Rule 5 includes counter-claims. The only trace of authority on the point is a passage cited as a dictum of Hall, V.C., who said in *Padwick* v. *Scott* (1) that, "assuming" the claim spoken of in Order XVII., Rule 5 can be considered to include a counter-claim, the meaning of the clause is as he afterwards proceeds to explain. But looking at the object and terms of the judgment, I think that the Vice-Chancellor merely assumed the case for the purposes of argument and not as a proposition to which he assented. In my opinion Order XVII., Rule 5 does not include the case of a counter-claim, and the defendant was not at liberty here to join a claim against the plaintiff as executrix with a claim against the plaintiff in her personal character, and I therefore think that, on that ground, the counter-claim inadmissible as it stands. I must also say that even supposing I am wrong, and that in certain cases it would be possible to join a counter-claim against the plaintiff personally with a counter-claim against him in an executorial capacity, we ought to jealously guard against its being done in such a way as to embarrass and inconvenience the fair trial of the action; and it appears to me that such joinder would be inconvenient and undesirable in the interests of the respective parties in this particular case. Independently of a question suggested by my Brother Lindley as to the existence or deficiency of assets, I think that a counter-claim drawn so as to be embarrassing ought not to stand in such form. I cannot see whether it is intended to set up a counter-claim against the plaintiff as executor or personally. That is an ambiguity on the face of the counter-claim itself. It appears that Field, J., refused to overrule the master's order because he thought it was a counter-claim against the plaintiff personally, and I think that is what will practically prove to be the case. Therefore, I think, our only alternative is to strike it out altogether, or to act on the power given in Order XXII., Rule 9, and order that the counter-claim may be excluded simply, or to make some such order as to us shall seem just. We do not think it necessary to exclude the counter-claim simply by striking

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(1) 2 Ch. D. 736, at p. 743.

(2) 2 Ex. D. 324.

(1) 2 Ch. D. 736, at p. 743.

it out and leaving the defendant to plead afresh, because it would be easy to strike out those parts which we think are embarrassing, and therefore our order is that this shall be done; and that the costs of the order shall abide the event of the action.

Lindley, J. I am of the same opinion. It is unnecessary to strike out the counter-claim which may be easily altered. But I do not think that it should stand as it is, for these reasons: this is an action by the plaintiff on a covenant to repair, to the benefit of which she says that she is entitled as tenant for life of the premises as her separate property. She does not claim as executrix in any way, but on the theory that she is entitled to sue in her own name and capacity. The defendant sets up in answer a case of a threefold description. She says, first, "I have a claim against you, the plaintiff, personally, on the ground that your predecessor in title entered into covenants running with the land which bind you giving me an option of purchase, and I claim damages from you for breach of that covenant against you yourself and not against you as executrix." That is a claim against the plaintiff in her individual character, and ought not to be struck out. Secondly, the defendant says: "I have a claim against you individually on the ground of certain expenditure on the land by me with your knowledge, you knowing of the option to buy," this claim also is against her in her personal capacity, and the defendant ought to be allowed to raise it. Thirdly, the defendant says: "I claim damages against you as representing the estate of the person who entered into a covenant for the option to purchase." That is so distinct that I think the claims ought not to be mixed up together, and it is inconvenient that they should be. I do not think that the provisions of the Judicature Act apply. The claim is by the plaintiff in her individual capacity, and the counter-claim is against her in both her individual capacity and her executorial capacity. In this view it is obvious that, assuming the latter cause of action lies, it is not directly or indirectly a defence to her claim. If she happened to be sole legatee, and there were no debts, it might possibly be a defence; but as it stands it is none, and, therefore, were it allowed, and she succeeded in the action, there would be a judgment in her favour on her cause of action and, perhaps, a judgment against her in a totally different capacity, which would require to be worked out in a different way. The Order authorizing counter-claims is Order XIX., Rule 3. It says that a defendant may set up "any right or *claim*, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a *statement of claim in a cross action*, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim."

ChD 804

Reading that without the context or other sections, or the light of authorities, I should understand that the defendant in any action might set off, or set up by way of counter-claim, any claim against the plaintiff *in the same character in which he sues himself*, and the proviso to the section confirms that view. I see nothing in this particular case to bring it within the language of that Order. Then Order XVII., Rule 5, is obviously inserted to prevent the difficulty where a plaintiff is suing on something which might give a cause of action in his executorial capacity as was pointed out in *Padwick* v. *Scott* (1)

If this were a case under Order XVII., Rule 5, it might possibly be that the case against the plaintiff as executrix is wholly distinct from that against her in her own capacity. It appears to me, therefore, that the defendant has failed to establish her counter-claim. Then what is to be done? We think the counter-claim should be amended by striking out so much as relates to the claim against the plaintiff as executrix.

Counter-claim to be amended accordingly.

Solicitor for plaintiff: *Whitehouse.*
Solicitors for defendant: *Freshfields & Williams.*

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(1) 2 Ch. D. 736, at p. 743.

Ex parte ALICE COCKERELL.

1878
Nov. 21.

Conveyance by Married Woman—3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1—Setting aside Order on the Ground of Fraud or Suppression of Facts.

Where an order under 3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1, for the conveyance of a married woman's interest in property bequeathed to her has been obtained by fraud or the suppression of facts which ought to have been disclosed at the time,—the Court will set it aside: but a clear case must be made out.

In February, 1876, an order was made under 3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1, to enable Mrs. Alice Cockerell to convey her interest in certain personal property to which she was entitled under the will of her late father, without the concurrence of her husband, upon the usual affidavit that he had deserted her, and contributed nothing towards her support, and that she did not know where he was.

Crispe,—the estate of the testator being now in course of distribution in the Chancery Division,—on behalf of the husband, by way of appeal from Lush, J., at chambers, moved to set aside the order, on the ground that the affidavit upon which it was obtained was untrue as to the allegation of the husband's desertion and of the wife's ignorance of his whereabouts, and also with regard to the value of the property. It was admitted that the order had been partially acted upon; and there was no suggestion of fraud.

Lane, contrà, was not called upon.

Lord Coleridge, C.J. These applications must be watched with care. If it can be shewn that the order was obtained by fraud or by the suppression of information which it was essential that the Court should have, the Court will undoubtedly set aside the order. But nothing of the kind is suggested here. The application was supported by the affidavit of the wife, which even now seems to have been substantially true at the time. If any information had recently come to the knowledge of the person to be affected by the order, there might be some ground for this motion. The whereabouts of the wife, however, seems to have been well known to the husband; and no attempt has been made

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EX PARTE ALICE COCKERELL.

to interfere with the order until the near approach of the time for the division of the fund. This application must be rejected with costs.

LINDLEY, J. It should be understood that every order ex parte which is obtained by means of fraud or the suppression of facts will be set aside. But, when we come to look at the materials here, there appears to be nothing to shew that the Court was imposed upon when the order was made.

Lane asked that the interim injunction granted by Lush, J., to restrain the wife from further acting upon the order might be discharged, and that the costs (which had been reserved) should be paid by the applicant.

PER CURIAM. Let the injunction be dissolved, and all the costs be paid by the applicant.

Order accordingly (1).

Solicitor for the applicant: *Albert Fleming.*
Solicitors for the wife: *Layton & Jaques.*

Nov. 11. ✓

[IN THE COURT OF APPEAL.]

TWYCROSS *v.* GRANT AND OTHERS.

QBD 11-2
Ch D 488

Practice—"Interest" or "Cause of Action" surviving to the Personal Representative of the Plaintiff—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 38 *—Rules of the Supreme Court,* 1875, *Order L., Rules* 1 *and* 4.

An action was brought to recover from the promoters of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them, in breach of s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), omitted to disclose certain contracts, which ought to have been specified therein. After judgment and pending an appeal to the House of Lords the plaintiff died:—

Held, affirming the decision of the Common Pleas Division, that under Order L., Rule 4, of the Rules of 1875, the plaintiff's interest in the action survived and was capable of "transmission" to his personal representative.

THIS action was brought by the plaintiff James Twycross against Grant and others to recover back 700*l.* the price of seventy

(1) See *In re Rogers,* Law Rep. 1 C. P. 47.

shares in a joint-stock company called The Lisbon Steam Tramways Company, on the ground that he had been induced to buy the shares in question by the fraudulent suppression by the defendants, the promoters of the company, in the prospectus published by them, of certain contracts which ought to have been disclosed therein pursuant to s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131).

The action was tried before Lord Coleridge, C.J., at the London Sittings in Easter, 1876, when the jury found for the plaintiff upon certain questions submitted to them. The case came before the Common Pleas Division upon a motion to enter judgment and also a rule for a new trial on the ground that the damages were excessive—see *Twycross* v. *Grant* (1)—when that Court gave judgment for the plaintiff, but ordered that 700*l.* should be paid into court, pending an appeal. The Court of Appeal on the 2nd of June, 1877, affirmed the decision of the Common Pleas Division. The defendants appealed to the House of Lords. Before the appeal came on for hearing, viz. on the 11th of February, 1878, the plaintiff died; and on the 5th of March letters of administration to his estate and effects were granted to his widow, Ellen Twycross, who was the sole legal personal representative of the plaintiff. On the 18th of May, it was ordered by a master, on the application of the administratrix, that she "be made a party to the action, and that she be at liberty to carry on and prosecute the same against the defendants." A summons was afterwards taken out, at the instance of the defendant Grant, to set aside the last-mentioned order, on the ground that the action did not survive to the administratrix. This summons was referred by the master to a judge at chambers, who referred it to the Common Pleas Division.

Pollard moved to set aside the order of the 18th of May, on the ground, that the cause of action was not one which survived to the personal representative. The power to make the order rests entirely upon Order L., Rules 1 and 4. (2) Under the Common

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(1) 2 C. P. D. 469.

(2) Rule 1 provides that "an action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue." And rule 4 provides "where by reason of marriage, death, or bankruptcy, or any other

Law Procedure Act, 1852, s. 137, the mode of continuing the proceedings, where a party to an action died, was by suggestion. The effect of the new rule is rather to narrow than to enlarge the old practice. The order can only be made where the cause of action survives. This is an action ex delicto: it is founded upon an alleged statutory fraud and therefore falls within the maxim, "Actio personalis moritur cum personâ." The statute De Bonis asportatis, 4 Edw. 3, c. 7, for the first time gave a remedy to executors for the recovery of goods and chattels of their testators carried away in their lifetime. In 1 Williams on Executors, 7th ed. 793, it is said: "The statute of Edw. 3 does not extend to injuries done to the person or to the freehold of the testator. Therefore, an executor or administrator shall not have actions of assault or battery, false imprisonment, deceit, nor (unless by virtue of the statute 3 & 4 Wm. 4, c. 42, s. 2) for diverting a watercourse, obstructing lights, or other actions of the like kind, for such causes of action still die with the testator."

[FIELD, J. The question here is, whether a cause of action, arising out of the omission of a statutory duty followed by injury to the property of the intestate, passes to the administratrix.]

There is no duty or obligation cast upon these defendants by statute: but a mere penalty for non-performance of a requirement of the statute 30 & 31 Vict. c. 131: see *Peek* v. *Gurney*. (1) See also the case of *Davidson* v. *Tulloch*. (2)

[FIELD, J. If Grant had died, and his estate had benefited by the fraud practised on the intestate, would not the cause of action have survived to the administratrix?]

That could not be denied. An administrator cannot have an

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event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto . . . . an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained ex parte on application to the Court or a judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

(1) Law Rep. 6 H. L. 377, 392, per Lord Chelmsford.

(2) 3 Macq. 783.

action for a breach of promise of marriage to the intestate, where no special damage is alleged: *Chamberlain* v. *Williamson.* (1) In *Knights* v. *Quarles* (2), an administrator was held entitled to maintain an action against an attorney for negligence in permitting the intestate to take an estate with a bad title. But that was a case of breach of contract; and all the reasoning of the Court in giving judgment is in favour of the present contention. *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (3) is to the same effect: but these are all cases of contract.

Then, assuming that this is a cause of action which would survive to an executor or executrix, it is not one which survives to an administratrix. The 4 Edw. 3, c. 7, gives the right of action to the executors. 25 Edw. 3, st. 5, c. 5, extends it to the executor of an executor. In the same reign passed the statute, which for the first time gave the ordinary power to grant letters of administration, viz. 31 Edw. 3, st. 1, c. 11. This being a statutory right, it can only enure to the class of persons, to whom it is expressly given by the statute: and it is dependent on the privity created by the intestate himself. The claim in this case could not be made an item in the inventory under 21 Hen. 8, c. 5: see *Boone's Case.* (4)

Sir H. James, Q.C., Morgan Howard, Q.C., and *H. T. Atkinson*, shewed cause. The cause of action here is, not a personal wrong done to the intestate, but a pecuniary loss or damage inflicted upon his estate by reason of the defendants' failure to perform a statutory obligation. It was a loss or damage in respect of which the administratrix herself might have sued. *Chamberlain* v. *Williamson* (1) is precisely in point. The rule is also laid down in 1 Wms. Saund. 245, and in 1 Williams on Executors, 793, and also in Broom's Maxims, 5th ed. 906 et seq. An administrator is within the equity of the statute 4 Edw. 3, c. 7: *Smith* v. *Colgay.* (5) See also *Wilson* v. *Knubley* (6) and *Hodgson* v. *Sidney.* (7)

FIELD, J. We are called upon to construe the 4th rule of Order L. of the Judicature Act, 1875. It is an entirely new

(1) 2 M. & S. 408.
(2) 2 B. & B. 102.
(3) Law Rep. 10 C. P. 189.
(4) Sir T. Raym. 470.
(5) Cro. Eliz. 384.
(6) 7 East, 127, 134.
(7) Law Rep. 1 Ex. 313.

provision, and one which is of an extremely beneficial character, and was intended to remedy the scandal and abuse of an action which has proceeded to almost its last stage being rendered fruitless by reason of the death or bankruptcy of the suitor. I think the reason and principle of the matter are in favour of the order made by the master. I might take my stand upon the case of *Chamberlain* v. *Williamson* (1), where Lord Ellenborough says (2): "The general rule of law is, actio personalis moritur cum personâ; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." I hold the provision in question to be of a remedial character, and to be one which ought to be construed liberally, to meet the evil aimed at. Is there, then, in this case any cause of action, any interest, which is capable of "transmission" to the administratrix? What was the interest of the intestate in the subject-matter of the action? It is described in the declaration thus,—The defendants were the promoters of a company registered under the Companies Acts 1862 and 1867, and, before the issuing of the prospectus, had entered into certain contracts, and they issued the prospectus and invited the public to take shares in the company without disclosing the contracts therein; and the intestate, upon the faith of the prospectus, and having no notice of the contracts, bought shares in the company and paid a large sum for them, which but for the concealment,—which by s. 38 of the Companies Act, 1867, is to be "deemed fraudulent,"—he would not have done; and the shares being worthless he lost his money. I cannot help thinking that that was an interest in the intestate, which was capable of transmission to his personal representative. There has been a death "causing a change or transmission of interest," and it has "become desirable" that the administratrix should be made a party to the action. It has been contended by Mr. Pollard that rules 1 and 4 are to be read together, and therefore that, unless the cause of action "survives or continues," the 4th rule does not come into operation. I come to the conclusion, however, that this case falls

(1) 2 M. & S. 408.

(2) At p. 415.

within the rule laid down by Lord Ellenborough in *Chamberlain* v. *Williamson* (1), and consequently that the order of the 18th of May was rightly made, and this motion must be dismissed with costs.

HUDDLESTON, B., concurred.

Motion dismissed.

The defendant appealed.

Nov. 11. *Pollard*, for the defendant.

Sir H. James, Q.C., and *H. T. Atkinson* (*Morgan Howard, Q.C.*, with them), were not called upon to argue.

BRAMWELL, L.J. In my opinion this appeal must be dismissed. It is clear that at common law the rule as to torts was correctly expressed by the maxim, "Actio personalis moritur cum personâ." This rule was greatly altered at an early stage of our legal history by 4 Edw. 3, c. 7, and this statute being remedial in its nature, and also those amending it, have been construed very liberally: they have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature. And it has been held that an action will lie at the suit of an executor against a sheriff for a false return in the lifetime of the testator: *Williams* v. *Cary* (2); and also for an escape: *Berwick* v. *Andrews* (3); and the reason is that by these wrongs the value of the testator's personal estate was diminished (4). This has been established for centuries, and the rule of law has been made still clearer by the legislature, which by 3 & 4 Wm. 4, c. 42, s. 2, has given a more extended remedy to and against executors for wrongs committed during the lifetime of their testators; for it seems to have been assumed at the time of passing that statute, that an executor was entitled to maintain an action for any wrong whereby the personal estate had been injured. It has been contended that special damage to the estate ought to be pleaded, or at least shewn, before an executor can sue: I do not think so; it will be sufficient if, from the nature of the injury, it must diminish the personal assets. The counsel for the defendant has relied also on the judgment of Lord Chelmsford in *Peek* v. *Gurney* (1): amongst the questions argued before the House of Lords it had been contended that the executors of a deceased director of a company were liable for the injury occasioned by his misrepresentations as to its solvency. Lord Chelmsford held that they were not liable; but the ground of his decision appears to have been that the director's "estate derived no benefit from the misrepresentation to which he was a party," and no doubt was thrown upon the authorities shewing that an executor may sue for a wrong committed to the personal estate of the testator during his lifetime; moreover, apart from 3 & 4 Wm. 4, c. 42, s. 2, a wide distinction exists between the liability of an executor to be sued and his right to sue. It was also suggested that the rights of an administrator stood upon a different footing from those of an executor; but this contention was not seriously persisted in. In 3 & 4 Wm. 4, c. 42, s. 2, executors and administrators are put upon the same ground with respect to the remedies created by that enactment: and this course would not have been adopted by the legislature, if it had not been clear that at the time of passing the statute the rights of executors and administrators were the same. I am satisfied that the administratrix was rightly made a party to the action.

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(1) 2 M. & S. 408.

(2) 4 Mod. 403; 12 Mod. 71.

(3) 2 Ld. Raym. 971, at p. 973.

(4) See *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 C. P. 189), commented upon in *Leggott* v. *Great Northern Ry. Co.* (1 Q. B. D. 599).

BRETT, L.J. It seems to me clear that the cause of action survived to the administratrix, and that she was rightly substituted as plaintiff in the suit. Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shewn upon the face of the proceedings that an injury has accrued to the personal estate. It seems to me that this circumstance need not be alleged in express terms in the pleadings, and that it is sufficient if the fact of injury appears by necessary implication. In the present case the declaration averred that the shares taken by the intestate were worthless, and that he lost the moneys paid for them (2); this averment, as we must now take it, was proved, and therefore it plainly appears upon the face of the proceedings that the personal estate of the intestate was diminished to the extent of 700*l.*, the amount of his loss as found by the jury. But, further, in my opinion it is not necessary that the injury to the personal estate should appear upon the pleadings; it is sufficient, if it be shewn at the time when application is made to add the executor or administrator as a party to the action.

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(1) Law Rep. 6 H. L. 377, at pp. 392, 393.

(2) 2 C. P. D. at pp. 471, 473.

COTTON, L.J. I think that the order making the administratrix a party to the action was right. The question before us arises under Rules of the Supreme Court, Order L., Rule 4. The right of action survives to the administratrix, and she can sue for the tort committed during the lifetime of the intestate; his personal estate has vested in her, and she can successfully claim compensation for any injury to it. In my opinion the injury to the personal estate is sufficiently averred in the declaration (1). It has been argued that this is an action to recover damages: in one sense that is true; but it is an action for a wrong done, not to the intestate himself, but to his property; therefore the right to sue upon his death was transmitted to his personal representative. For the defendant, reliance has been placed upon the judgment of Lord Chelmsford in *Peek* v. *Gurney* (2): it is sufficient to say that in the opinion of his Lordship the executors of the deceased director were not liable, because his estate derived no benefit from the misrepresentation to which he was a party; here the personal estate of the intestate was injured. The difference between the two cases seems to me very great.

Appeal dismissed.

Solicitors for administratrix: *Mercer & Mercer.*
Solicitor for defendant: *J. J. Ridley.*

(1) 2 C. P. D. at pp. 471, 473.
(2) Law Rep. 6 H. L. 377, at pp. 392, 393.

1878
Nov. 12.

[IN THE COURT OF APPEAL.]

HUNT *v.* THE WIMBLEDON LOCAL BOARD.

Corporations—Contracts under Seal—Local Boards, Contracts by—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.

4QBD201
4QBD530
532-3
QBD583
ChD540
App Cas 19, 527
QBD231

By s. 174 of 38 & 39 Vict. c. 55, every contract made by an urban authority whereby the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority.

The defendants, an urban authority, verbally directed their surveyor to employ the plaintiff to prepare plans for offices. The plans were prepared by the plaintiff, and the defendants advertised for tenders for building the offices in accordance therewith, but when these were sent in, it was found that the plaintiff's plans were upon too expensive a scale, and the intended offices were not erected. There was no ratification under seal of the act of the plaintiff's surveyor in procuring the plans. At the trial the jury found that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed, and that the cost of the plans was 94*l.*:—

Held, that, assuming the contract was founded on an executed consideration, the plaintiff could not recover, for s. 174 was imperative, and not directory, and applied to every contract for a sum exceeding 50*l.* entered into by an urban authority.

Semble, that, as the plaintiff's plans did not enable the defendants to erect the offices required by them, they had not derived such a benefit as would entitle the plaintiff to sue upon an executed consideration.

APPEAL from the judgment of Lindley, J., in favour of the defendants.

Action for work and labour done and money paid by the plaintiff for the defendants.

The facts proved at the trial before Lindley, J., were as follows: The surveyor of the defendants, acting under verbal instructions from them, in May, 1875, employed the plaintiff, an architect, to prepare plans and drawings for offices which they proposed to erect. The plans were not finished until after the 11th of August, 1875 (1), and were then approved of by the defendants, and advertisements were then issued for tenders for the buildings. Tenders were received, but none were accepted, the plans furnished by the plaintiff being of too expensive a character.

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(1) The Act that was in force when the plans were ordered was the Public Health Act, 1848 (11 & 12 Vict. c. 63), but before the plans were finished, this Act was repealed and replaced by the Public Health Act, 1875, which came into operation on the 11th of August, 1875. Sect. 85 of the earlier Act is substantially re-enacted by ss. 173 and 174 of the later Act, but as there was

The jury found that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was subsequently ratified by them; that the offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the buildings for which they were designed. They found the cost of the plans to be 94*l.* The learned judge directed that the judgment be entered in favour of the defendants. (1)

Patchett, Q.C., and *E. Clarke* for the plaintiff. Sect. 174 (2) of

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no material difference between s. 85 of the Act of 1848 and ss. 173 and 174 of the Act of 1875, except that 50*l.* is substituted for 10*l.* as the limit for contracts which do not require any particular formalities, the arguments and judgment of the Court of Appeal proceeded on ss. 173 and 174 of the Act of 1875.

(1) See 3 C. P. D. 208.

(2) By s. 4 of 38 & 39 Vict. c. 55, "local authority" means urban sanitary authority and rural sanitary authority. By s. 6, the local board is constituted an urban authority. By s. 7, every local board being an urban authority is made a corporation.

By s. 173: "Any local authority may enter into any contract necessary for carrying this Act into execution."

By s. 174: "With respect to contracts made by an urban authority under this Act the following regulations shall be observed:

"(1.) Every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority.

"(2.) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract is not duly performed.

"(3.) Before contracting for the execution of any works under the provisions of the Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work or for executing and also maintaining the same in repair during a term of years, or otherwise.

"(4.) Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same.

"(5.) Every contract entered into by

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the Act of 1875 is merely directory; it contains no words annulling contracts not made in compliance with its provisions. The defendants are therefore bound by the contract, although it is not under seal: *Nowell* v. *Mayor of Worcester* (1), *Frend* v. *Dennett* (2). The contract is a contract of employment, and does not come within s. 174 so as to require that it shall be in writing and under seal. By s. 173 the defendants may enter into contracts necessary for the execution of this act, and by s. 197 they may provide such offices as may be necessary. The jury have found that the new offices were necessary; the defendants are therefore liable by force of s. 173, for the contract is not within s. 174. Moreover, even at common law the plaintiff can recover. It is true that the defendants are a corporation, but the consideration is not executory but executed. The defendants have had the benefit of it; they are therefore bound to pay for what they have had, on the principle of law laid down in *Nicholson* v. *Bradford Union* (3); *Clarke* v. *Cuckfield Union* (4); *Haigh* v. *Brierly Union* (5). Further, the defendants are entitled to recover by analogy to the doctrine in equity that, where there has been an entering into possession of land purchased under a verbal contract, the entering into possession is such a part performance as will take the contract out of the statute of frauds, and make it binding upon the vendor: *Ungley* v. *Ungley* (6); *Wilson* v. *West Hartlepool Ry. Co.* (7) Thus, the plaintiff having performed his part of the contract, it becomes binding on the defendants, who are liable under it.

[BRAMWELL, L.J., intimated that the Court were of opinion that s. 174 is not directory but mandatory, and directed the counsel for the defendants to confine their arguments to the

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an urban authority in conformity with the provisions of this section, and duly executed by the parties thereto shall be binding on the authority by whom the same is executed, and their successors and all other parties thereto, and their executors, administrators, successors, and assigns, to all intents and purposes."

By s. 197: "Every urban authority shall from time to time provide and maintain such offices as may be necessary for transacting their business, or that of their officers and servants under this Act."

(1) 9 Ex. 457.

(2) 4 C. B. (N.S.) 576; 27 L. J. (C.P.) 314.

(3) Law Rep. 1 Q. B. 620.

(4) 21 L. J. (Q.B.) 349.

(5) E. B. & E. 873; 28 L. J. (Q.B.) 62.

(6) 5 Ch. D. 887.

(7) 2 D. J. & S. 475.

question whether the contract having been executed the plaintiff could recover.]

Marriott, Q.C., and *W. Paterson*, for the defendants. At the common law all corporations were permitted to contract as to certain small things without the formality of the contract being in writing or under seal. Then the decisions shew that there was a conflict of authority as to what contracts should be in writing and under seal, and as to what contracts this formality might be dispensed with. With regard to contracts made by local boards, the legislature by s. 85 of the Public Health Act, 1848, provided that all contracts exceeding 10*l.* in amount should be under seal; and by the later Act of 1875, which repealed the Act of 1848, s. 174, enacted that all contracts made by an urban authority exceeding in amount 50*l.* should be in writing and under seal. This is a general enactment, passed to get rid of the question what are contracts for small amounts, and by it all contracts whether executory or executed made by an urban authority must be made with the formalities prescribed by the section. This is a reasonable provision, for the urban authority are merely trustees for the ratepayers, and it is only just that the ratepayers should not be called upon to contribute their money in large amounts towards the rates, unless the contracts made by the urban authority were reduced to writing and made with all due formality, such as fixing the common seal. In this case the contract is not in writing and not under seal, and the plaintiff cannot recover.

Patchett, Q.C., was heard in reply.

BRAMWELL, J. I am of opinion that the judgment of Lindley, J., was right, and ought to be affirmed. First, I think that s. 174 is applicable to cases other than those alluded to in it, and that it is not limited to them. The section is general, and refers to every class of contract, and there is no reason for limiting it. In the next place, I think the section is not merely directory but obligatory. It is not prohibitory so as to constitute the making of a contract, otherwise than in writing and under seal, an offence, but it is a mandatory direction that contracts shall be made in a particular way, that is to say, in writing and under seal. The enactment relates to a contract which is the act of both parties,

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4QBD532

and is applicable not to one of them alone, but to both of them. I do not mean to say that the section makes anything particularly necessary upon the part of the contractee, but it requires that the evidence of the obligation of the two parties must be in writing and sealed with their seals. In this particular case the section is of importance, as drawing a line between cases where the contract shall or shall not be under seal. If it rested at the common law there might be a discretionary power as to what contracts should be entered into by parol and what contracts should be made under seal, such as contracts of small amount or acts of daily necessity, and some others which are said to be within the exception to the general rule that a corporation must contract under their corporate seal. If it were not for s. 174 it might be contended that contracts to the amount of 5*l.* or 20*l.*, or even 100*l.*, came within the rule. The legislature, however, have drawn the line and said that all contracts over 50*l.* must be entered into under seal, and contracts for a less amount may be made by parol. That being my opinion as to the effect of the statute, I think it clear that this is a contract, upon which, if after the order had been given it had been countermanded by the defendants, and the defendants had said to the plaintiff, "Do not go on with it, we shall not employ you," no action could have been maintained. Then it is said that this is not an executory contract, but an executed contract, of which the defendants have got the benefit, and for which they must pay. I will deal with that question presently. First, reliance is placed on the doctrine in equity as to contracts relating to land. It is said that a part performance, by entering into possession of the land under a verbal contract for its purchase, is sufficient to take it out of the Statute of Frauds. I think that that doctrine has no analogy to the present case, and the ground on which that law rests has been clearly stated by the Master of the Rolls in *Ungley* v. *Ungley*. (1) He says: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract, in order that justice may be done between the parties." That reason is not applicable to a case like the present. But it is said the plaintiff is entitled to recover at common law, because the defendants have had what is called the benefit of the contract; the plaintiff has done the work and the defendants have had the enjoyment of what he has done. That rule, I believe, exists to some extent, though I am not sure that it would be found to exist where the price of the executed contract was of a large amount, if, for instance, a railway were ~~built~~ for a company at the cost of some hundred thousand pounds. I should not like to say it is decided by the authorities that in such a case the contractor who had made the railway could recover the price, the incorporated company who employed him having given him only a verbal order. However, this doctrine exists to some extent or to some amount: that where a man has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work may recover. But whether that is limited to contracts for small amounts or not, I repeat, I will not say. It is, however, certainly limited to cases where the benefit has been actually enjoyed, and, as far as I know, to cases in which it could be said that the work is such as was necessary; that it was work which if the corporation had not ordered, they would not have done their duty; or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence. That seems to have been the state of things in those cases which have decided that the plaintiff may recover when the work has been done. I think, however, that that rule of law does not apply to the present case for two reasons. The defendants have not had the benefit of the work in that sense. No doubt the order for the work was given. After the finding of the jury, it must be taken that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was ratified by the defendants, and that the work was done pursuant to an order (or something equivalent to an order) which was given, and as far as that work went it was accepted in that sense by the defendants, who acted upon it, and issued advertisements in respect of it, and received tenders in relation to it. But that is all. Any

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(1) 5 Ch. D. 887.

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further benefit that the defendants would have derived from those plans, if the tenders had been accepted, would have been that their buildings should have been erected in accordance with those plans. What the defendants have done is this: they have to a certain extent taken to these plans and tried to use them—tried to apply them to the purpose for which they were wanted—but they found that the proposed plans were too expensive, and could not be used. I doubt, therefore, whether the defendants have had the benefit of the plans, in the sense in which it is plain the defendants had the benefit of the coals in *Nicholson* v. *Bradfield Union* (1), or of the water-closets in *Clarke* v. *Cuckfield Union.* (2) In both those cases it would have been contrary to the duty of the defendants if they had not given orders for the things supplied. In the present case the defendants might have continued transacting their business—possibly not so comfortably or so advantageously—without new offices; they might have waited for them.

I will now call attention to the cases. In *Nicholson* v. *Bradfield Union* (1), Blackburn, J., entertained great doubt, but followed the decision in *Clarke* v. *Cuckfield Union* (2). The amount, it must be recollected, which it was sought to recover against the defendants was small, only 26*l.* 10*s.* I doubt, therefore, whether that case would not come within the rule that orders for things of small amount may be given by corporations, if they are used for matters of urgency or necessity, without the contract being under seal. The action was for coals sold and delivered, to which the defendants set up as their defence that the contract with the defendants, a corporation, was not under seal. Blackburn, J., in delivering judgment, speaks with hesitation, and says: "The case of *Clarke* v. *Cuckfield Union* (2), is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment of that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present, at least, the case was rightly decided; there may be cases in which the circumstances may be different from those in *Clarke* v. *Cuckfield Union* (2) and the present case, and which would still be

(1) Law Rep. 1 Q. B. 620.

(2) 21 L. J. (Q.B.) 349.

governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke* v. *Cuckfield Union* (1), we prefer to follow the authority of *Clarke* v. *Cuckfield Union* (1), which we think is founded on justice and convenience." Again, in *Clarke* v. *Cuckfield Union* (1), I may point out that the contract was executed and the amount sued for small—it was only 14*l.* 16*s.* I would make a remark on the case of *Haigh* v. *Brierly Union* (2). I think that Erle, J., does not rest his decision on the ground merely that the work has been done, but he considered that the retainer of the plaintiff to investigate the accounts of the union and to do the work would have been a binding engagement. In *Nicholson* v. *Bradfield Union* (3), Blackburn, J., said, "that justice and convenience" require that where the contract was executed a defendant corporation should be held liable to pay for it. I am by no means clear that in such a case as this the defendants should be ordered to pay. I am by no means sure that persons who are exercising their authority daily should not exercise that authority in a proper manner; and I think it desirable that persons who make contracts with those who have an authority delegated to them should not act in a slovenly manner; and if they do not care to inquire what authority such persons possess they must take the consequences. I cannot but think that in the present case if there had been a little more solemnity in making the contract—if the contract had been reduced to writing, for instance—it is not improbable that the plaintiff's attention might have been called more particularly to the plans required, and he might have been told that if he prepared plans for the erection of expensive offices, they would not be such plans as the defendants required, as they could only lay out a certain sum of money on the buildings. Sects. 173 and 174 of the Public Health Act, 1875, were passed for the protection of ratepayers. I think they are good enactments, and we ought not to allow them to be frittered away.

BRETT, L.J. I am of opinion that even if s. 173 of this statute had not been enacted, the plaintiff could not recover, on the

(1) 21 L. J. (Q.B.) 349.

(2) E. B. & E. 873; 28 L. J. (Q.B.) 62.

(3) Law Rep. 1 Q. B. 620.

ground that the defendants were a corporation, and that this contract was not under seal.

The general rule is, that where the defendants are a corporation and the contract made with them is not under seal, the defendants are not liable. I think this case is within the general rule, and would not be within any of the recognised exceptions. It certainly is not within the exception which is mentioned—if it can be called an exception—or within that doctrine of the Court of Chancery which is applicable to the Statute of Frauds. That doctrine of equity with regard to the Statute of Frauds is equally applicable whether the defendant be a corporation, or whether the defendant be only an individual, and is founded upon the view that the Statute of Frauds only deals with a matter of evidence upon a suit or trial. In the case of the Statute of Frauds the original contract is perfectly valid, and the only effect of the statute is that in a contested suit no evidence can be given of that contract unless certain formalities have been observed. The Court of Chancery has held that in certain circumstances they will allow evidence to be given of the contract although the formalities of the statute have not been fulfilled. But that decision cannot have any reference or any application to a case where the contract originally, by a rule of law, is invalid. I think, also, that this case is not within any of the common law exceptions which have been suggested.

I think there is a common law exception, that although there be a corporation, with regard to which contracts in general must be under seal, yet if that corporation be of such a nature that daily, or periodically, or at frequent intervals, small transactions must take place, where it would be obviously of the highest inconvenience, or perhaps impossible, that each of such small contracts should be under seal, the common law courts have declared that there is an exception.

Upon this contract the plaintiff never could have had any claim until his plans were complete, and the making of plans is not a frequent occurrence, nor a necessary part of the defendants' business. For the performance of a small contract, therefore, this case is in no respect within the recognised exception. Another exception is suggested. It is said that there is a rule that where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

I doubt very much whether there is any such rule, either in law or equity. But it is unnecessary to consider this point, because here, assuming the order to have been given on behalf of certain persons, who may be called cestuis que trust, this is not a case within the rule. It is not like the case of a corporation where directors may give an order and make an apparent contract, and those on whose behalf they give the order may either reject or accept it; as, for instance, if the directors of a railway company verbally order a railway to be constructed by a certain contractor, the whole corporation (namely, the shareholders, on whose behalf the directors had given the order) may, if they should please, reject the order; but if the railway is constructed, they may accept it by obtaining the benefit of what the contractor has done and receiving dividends in respect of the use of the railway. Where there is a body of shareholders capable of accepting the benefit of the contract, such a doctrine as is suggested may be applicable. But here the board is the corporation, who are acting for the inhabitants, who can neither accept nor reject what the board has done. The inhabitants cannot make use of what the board orders in the same way or in the same manner as the shareholders of a railway make use of a railway. Suppose the case of drains being made; no doubt the inhabitants use them, but they do so without the option of rejecting them. It seems to me, therefore, that in the case of such a corporation as this the doctrine suggested would not be applicable at all. But even if the local board were such a corporation that the parties on behalf of whom the order was given need not take the benefit of the work done, I think that in this case neither the board nor the inhabitants have derived any benefit. The work done by the plaintiff is drawing plans in order that certain buildings may be built. He drew the plans and fulfilled the whole of what he undertook. But then the only real benefit of such work as the drawing of plans is that buildings should be built according to them. Now, I think it is clear that the board accepted the plans, and they made some use of them—that is, they used them so far that they allowed them to be inspected, that tenders might be made upon them. But that is not a beneficial user. It is no benefit to a person to give out plans to be tendered for if no tenders are made upon them, or nothing is done upon such tenders as are made. Therefore I think that, though the plans were accepted and partially used, no one obtained any real benefit from them. Therefore, even if the doctrine suggested had a real existence, and if the board, and the board alone, were the persons to be benefited, which I think is not the case, even then the board has not had such a benefit from this work as would bring this case within the suggested exception to the general rule. Therefore, even independently of the statute, I am of opinion that the plaintiff cannot recover. But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than directory. It is what has been called mandatory. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this. The legislature, knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what were small matters, and to say that contracts which the board would not otherwise be authorized to make might be made for amounts less than 50*l.*—that is to say, that if they were necessary and under 50*l.*, they should be brought within the recognised exception as to small matters; and that if they were over 50*l.*, the mere fact of their being over 50*l.* would prevent their coming within the exception.

With regard to the cases that have been cited, I concur with Bramwell, L.J. The case of *Haigh* v. *Brierly Union* (1) appeared to be most like the present, but it is not necessary to say whether we should have thought that the facts of that case come within the exception. But I cannot help thinking on looking at the judgment of Crompton, J., that he acceded to the judgment in that case, whether rightly or wrongly, upon the assumption that the contract related to an act of frequent occurrence and for a small amount and therefore within a recognised exception. It signifies not whether we should agree that the facts brought it within the exception; the judgment did not assume to state any new law, but only to bring the facts of the case within the recognised rule.

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(1) E. B. & E. 873; 28 L. J. (Q.B.) 62.

I am of opinion that this judgment should be affirmed.

COTTON, L.J. I also am of opinion that the judgment of Lindley, J., was right. First, I shall deal with the question as if there had been nothing special in the Act of Parliament as to the contract entered into by the local board in this case. The common law being that a corporation cannot bind itself by contract except under seal, there are certain exceptions to that rule. There is one exception, that for the purpose of carrying out the ordinary business for which the corporation has been formed, it has power to bind itself without a contract under seal. But that is only in small matters necessary for the ordinary business of the corporation. There are, however, reasons why that cannot apply to this case, so as to bring the matter within such an exception. But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal, and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation, but those for whom the corporation act as trustees. I cannot see that the principle can apply to a corporation constituted as this is, existing not for its own benefit, or for doing that from which it can derive any benefit, but as trustees for a certain portion of the public. But even if such a corporation can be so bound, in my opinion there has not been such a beneficial user of these plans as to bring the case under that exception. No doubt there has been a certain user, but a user which produces no benefit to the corporation, or to the inhabitants of the district, for in consequence of the plans not being suitable the matter went no further than the using of the plans for the purpose of obtaining tenders; and when the tenders came in, it was found that the plans could not be carried into execution, and therefore the plans were not used for what, in my opinion, is the most important part of the purpose for which they were made, viz. for the purpose of the erection of offices for the use of this corporation.

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Then what is the effect of the statute? It was argued that such a contract as this did not come within s. 174, because that section only applied to contracts necessary to carry this Act into execution, and that obtaining these plans and building new offices did not come within that description; but unless this is a work necessary for carrying the Act into execution, I do not see how it is possible that the corporation had power to enter into any contract with reference to the matter. Certainly, if they had offices, it must be for the purpose of carrying the Act into execution, and any contract relating to those offices is a contract for the purpose of carrying the Act into execution. Therefore s. 174, in my opinion, applies to this contract, and whatever may be the case as regards sub-s. 3 of that section, in my opinion, sub-sect. 1, which relates to the manner in which the contract between the two is to be made, is mandatory, and prevents any contract for an amount exceeding 50*l.* from being entered into under the Act except under seal.

The Act gives power to the corporation to provide funds for the purpose of carrying into execution the provisions of the Act, that is so say, to levy rates. And in my opinion the meaning of the Act is, that as regards contracts where the amount exceeds 50*l.*, the board shall not charge the rates which they have power to levy except by a contract under seal. Therefore I am of opinion, subject however to what I am about to say, as regards the equitable doctrine, that there can be no decree in this case for the plaintiff. But it was said that the case came within the equitable

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doctrine of part performance. For the purpose of considering this question, I will deal with the cases of *Ungley* v. *Ungley* (1) and *Wilson* v. *West Hartlepool Ry. Co.* (2), which were principally relied on. We must bear in mind that this is a contract which in former days the Court of Chancery would not have enforced. *Ungley* v. *Ungley* (1) was an instance of part performance taking the case out of the Statute of Frauds. There had been a contract entered into by a father at his daughter's marriage in relation to a house; and as there was no agreement in writing, the Statute of Frauds would have prevented any action being maintained to enforce the contract. But possession had been given to the parties who sought to recover, and therefore the Court of Equity said there was such part performance as enabled it to act on parol evidence of the contract. Courts of Equity, in my opinion, acted on this principle. The Statute of Frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was. But if a Court of Equity finds an overt act, such as the possession of land, then the presumption of a contract is raised, and the Court will, in consequence of that overt act, allow parol evidence to be given for the purpose of ascertaining what the actual contract was. These are the cases in which the Courts of Equity have given an effect to contracts valid at common law, which could be enforced but for the Statute of Frauds. That is the ground on which these cases rest, and that it is not on the ground of fraud is shewn by this, that the payment of the price to a vendor will not take the case out of the statute. But surely it is as great an injustice for a man to receive the price and then say, "You cannot enforce the contract," as to repudiate the contract where possession has been given. When there is an overt act, a Court of Equity will receive parol evidence of the contract; but that is in cases of specific performance of contracts relating to land which are valid at common law.

The other case which was referred to was the case of *Wilson* v. *West Hartlepool Ry. Co.* (2). There Turner, L.J., gave judgment, and Knight Bruce, L.J., did not concur. I need scarcely say that

(1) 5 Ch. D. 887.

(2) 2 D. J. & S. 475.

the opinion of Turner, L.J., is one which I should hesitate to dissent from. But he to a great extent is in that case dealing with the difficulty of the Statute of Frauds. The powers of the defendants in that case were unlike those of the present defendants. They were a railway company governed by the provisions of the Companies Clauses Consolidation Act. That statute provides that contracts which if made by private individuals must be in writing will bind the company if signed by two directors; the statute says not that they must be so made, but that they may be, and Turner, L.J., is applying the principle of part performance of parol contracts relating to land made by individuals to the case where the defendant was a railway company, capable of being bound by the written contract of its directors, as an individual is capable of being bound by his own contract in writing.

There are other parts of the judgment of Turner, L.J., to which the explanation does not apply. He is there referring to an equity enforced by Courts of Equity independently of contract. It is this: if an individual who has to his knowledge title to land sees another (who is ignorant of such title and believes that he has a good title) expending money on the land, and yet gives no notice of his own title, a Court of Equity will not afterwards allow him to assert his title to the prejudice of the person whom he has allowed to act in ignorance of that title. This is an entirely different equity inapplicable to the present case.

Judgment affirmed.

Solicitor for plaintiff: *W. T. Foster.*

Solicitor for defendants: *W. H. Whitfield.*

[IN THE COURT OF APPEAL.]

1878
Nov. 13.

MEYERHOFF AND ANOTHER *v.* FROEHLICH.

Statute of Limitations—Promise to revive a Debt under 9 *Geo.* 4, *c.* 14, *s.* 1.—*Conditional Promise.*

In May, 1874, the defendant, in answer to a demand of a debt incurred by him, wrote to the plaintiffs as follows: "I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." In September, 1876, he again wrote: "Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." At the trial the defendant admitted that in one year since 1874 his income was greater by 14*l.* than it had been in that year; but no proof was adduced that the "general commercial crisis" alluded to in the defendant's letter of September, 1876, had given way:—

Held, affirming the judgment of Denman, J., that if the defendant's letters constituted such acknowledgments as to warrant the inference of promises to pay, they were conditional promises only, and there was no proof of the substantial fulfilment of the conditions.

APPEAL by the plaintiffs from the judgment of Denman, J., in favour of the defendant. The facts of the case are fully stated in the report of the proceedings before that learned judge (1), and the following brief summary of them will be sufficient.

The defendant owed the plaintiffs a sum of money, and made payments on account of the principal and interest; the last payment was made on the 13th of January, 1870. In reply to an application from the plaintiffs for payment, the defendant, by a letter dated the 29th of May, 1874, wrote: "Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." In another letter, dated the 15th of September, 1876, the defendant wrote to the plaintiffs: "Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." The defendant had an income of 200*l.* a year arising from commissions, and in one year after 1874 his income was 214*l.* No proof was adduced, that "the general commercial crisis" alluded to in the defendant's letter of the 15th of September, 1876, had given way.

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(1) 3 C. P. D. 333.

Nov. 12, 13. *C. Crompton* (*C. Russell, Q.C.*, with him), for the plaintiffs, in support of the appeal. At the time when the defendant wrote the letter of the 29th of May, 1874, the debt had not been barred by the Statute of Limitations; and therefore, as the plaintiffs might have immediately sued him, his letter ought not to be construed as containing a repudiation of liability; on the contrary, he admits the debt: *Collis* v. *Stack* (1); *Sidwell* v. *Mason* (2); *Lee* v. *Wilmot* (3); *Chasemore* v. *Turner* (4); and this is a sufficient acknowledgment to take the case out of the statute. The letter of the 15th of September, 1876, in truth contains an absolute acknowledgment: *Bird* v. *Gammon* (5); *Cornforth* v. *Smithard.* (6) The facts of the present case do not fall within the principle of *Smith* v. *Thorne.* (7) It follows from the authorities that if before a debt is barred by the Statute of Limitations, the debtor, while acknowledging his liability, promises to pay only upon a condition, he must express that condition in clear terms; otherwise the acknowledgment will be construed to be absolute. Further, if the promise contained in the letter of the 29th of May, 1874, was conditional, the condition has been fulfilled; in one year the defendant's income has been larger by 14*l.*

C. H. Hopwood, Q.C., for the defendant, was not heard.

BRAMWELL, L.J. It is unnecessary to call upon the defendant's counsel to argue this case. This branch of the law does not stand upon a satisfactory footing, and affords scope for amendment by the legislature. Apart from what is laid down in decided cases, I should be inclined to think that a debt is taken out of the statute by an acknowledgment, and that no express promise to pay it is necessary; but I cannot think that the debtor renders himself liable, if, while he acknowledges that the debt formerly existed, he nevertheless claims the benefit of the Statute of Limitations. The language of 9 Geo. 4, c. 14, s. 1 (1), is not very precise; but possibly "acknowledgment" refers to actions of debt, and "promise" to the former actions upon the case upon promises. But certainly the law is not clear. It has, however, been established by *Tanner* v. *Smart* (2), and similar cases, that a mere acknowledgement will be insufficient, if the debtor states either that he will not pay, or that he will pay only upon a condition which remains unfulfilled, or at a time which has not elapsed. Beyond establishing this principle, I do not think that much assistance is to be obtained from a perusal of the cases, for one carelessly written letter is not of much use in construing another. I cannot think that these letters take the debt out of the Statute of Limitations. It is true that the defendant acknowledged his liability; but it is plain also that he was contemplating something that might possibly thereafter happen, namely, the improvement in his pecuniary position, and that he did not intend to pay the debt until that improvement should have taken place; and I am of opinion that Denman, J., was right in holding that the evidence did not satisfy him, that at the time of issuing the writ the defendant was in a better position than he was when he wrote the letter dated the 29th of May, 1874. The plaintiffs' counsel also contended that the defendant's letter of the 15th of September, 1876, was sufficient to defeat the operation of the Statute of Limitations: the terms of that letter are too vague and indefinite to amount to a promise; and further, if any promise can be inferred, it is a promise to pay "as soon as the general commercial crisis gives way;" and there was no evidence that this has occurred; therefore the condition attached to the promise has not been fulfilled. This appeal must be dismissed.

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(1) 1 H. & N. 605; 26 L. J. (Ex.) 138.

(2) 2 H. & N. 306; 26 L. J. (Ex.) 407.

(3) Law Rep. 1 Ex. 364.

(4) Law Rep. 10 Q. B. 500.

(5) 3 Bing. (N.C.) 883.

(6) 5 H. & N. 13; 29 L. J. (Ex.) 228.

(7) 18 Q. B. 134; 21 L. J. (Q.B.) 199.

(1) By 9 Geo. 4, c. 14, s. 1: "In actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments" (Statutes of Limitations, 21 Jac. 1, c. 16, and 10 Car. 1, s. 2, c. 6), "or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby."

(2) 6 B. & C. 603.

BRETT, L.J. Upon a reference to the decisions which have taken place, the construction of 9 Geo. 4, c. 14, s. 1 becomes clear: in order to keep alive the liability of the debtor there must be a written acknowledgment or promise to pay; from a simple acknowledgment a promise to pay may be implied; but if there be an express promise, no promise can be implied from the acknowledgment. I do not think that much doubt can be felt as to what the law upon the subject really is; but sometimes doubts arise, owing to the varying language in which different persons express themselves. In the present case I think that the correspondence does not take the case out of the Statute of Limitations: it is true that in the letter dated the 29th of May, 1874, the defendant acknowledges the debt and he promises to pay it; but that promise is conditional upon his position becoming somewhat better. The defendant did not mean that he would pay the debt, if his income should become one shilling a year larger; and I think it almost equally clear that he intended to discharge his liability only when his means should be substantially increased, and that an addition of 14*l.* in one year is not such a substantial increase as was intended by him. The facts do not contain any other evidence shewing that his position became improved before action. From the letter of the 15th of September, 1876, no promise can be implied: it seems to me to be the letter of a man, who feels himself to be in a nearly hopeless condition. I fully agree with the judgment at which Denman, J., has arrived.

COTTON, L.J. It seems to me that the judgment of Denman, J., was correct. The cases which have been decided upon 9 Geo. 4, c. 14, s. 1, have put a construction upon it, which we are bound to adopt; that construction is as follows: in order to prevent a debt from being barred by the Statute of Limitations, there must be a written acknowledgment or promise to pay; from a simple acknowledgment a promise may be implied; but if there be a conditional promise, the condition must be fulfilled. With respect to the correspondence before us, I may say that if there be an express promise there can be none by implication, and if the whole tenor be inconsistent with an unconditional admission, the inference necessary to sustain the plaintiffs' case cannot be drawn.

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The defendant in his letters states that it is beyond his power to pay; but it was argued that they contained a promise to pay. In the letter of the 29th of May, 1874, there was a promise to pay, but it was upon condition that his means should first become somewhat better: I think that this condition has not been fulfilled. The additional 14*l.* above 200*l.* is a slight improvement, but, notwithstanding this circumstance, we must look at all the circumstances, and I do not think that the defendant's position has become better within his meaning. That letter of the 15th of September, 1876, does not contain an express promise to pay; and it has not been even shewn that "the general commercial crisis" has given way.

Judgment affirmed.

Solicitors for plaintiffs: *Pritchard, Englefield, & Co., for Edwin Storer, Manchester.*

Solicitors for defendant: *Chester & Co., for John Farrington, Manchester.*

WOODS v. M'INNES.

Nov. 5.

Practice—Leave to serve a Defendant in Scotland—Order XI, Rule 5, of the Orders of June, 1876.

[illegible]

To obtain leave to serve a defendant in Scotland, it is not enough to shew the amount of the claim, that the contract was made and the breach of it occurred in London, that the plaintiff and also the agent of the defendant (who signed the contract) reside in London, that all the plaintiff's witnesses reside in London, and that it would be more convenient and less expensive to try the action in London than in Scotland. The affidavit should go on to shew in what respect, regard being had to the facilities for trying the cause in the neighbourhood of the defendant's residence, it would be cheaper and more convenient to try in London.

THE plaintiff applied at chambers for leave to serve a writ upon the defendant, a British subject residing at Ardrossan, in Scotland, upon an affidavit that the defendant was indebted to the plaintiff in 59*l.* 10*s.*, being brokerage upon a charterparty entered into in London for the charter of a ship belonging to the defendant; that the charter was signed in London by the charterers and also by the agents of the owner who were resident in London; that the plaintiff resided in London and that the commission (which was due on the 21st of February last) was payable in London; that no witnesses whom the plaintiff would require to call were in

Scotland; and that it would be much more convenient and less expensive to have the action tried in London than it would be to have it tried in Scotland.

Field, J., refused the order, on the ground that the affidavit did not disclose enough to be a compliance with Rule 5 of Order XI. of the Orders of June, 1876. (1)

Hilbery moved by way of appeal. The contract upon which the plaintiff sues was made in London and was to be performed there, the breach took place in London, all the witnesses for the plaintiff are in London, and it is sworn that it would be much more convenient and less expensive (which is obvious) to have the action tried in London than in Scotland. It is difficult to conceive what more can be usefully required.

Grove, J. The judge should have information before him as to the comparative convenience of a trial in the one place rather than in the other. He cannot be said to have this unless he is informed whether or not there is at the place where the defendant resides a local court which has jurisdiction in the matter in question. I agree with my Brother Field that this affidavit falls short in this respect of the requirements of the rule.

Denman, J., concurred.

Motion dismissed.

Solicitors for plaintiff: *F. W. & H. Hilbery.*
Solicitor for defendant: *John Hill.*

(1) Rule 5 provides that: "Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in any such action, when such contract was made or entered into within the jurisdiction, or wherever there has been a breach within the jurisdiction of any contract wherever made, the judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local court of limited jurisdiction having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence; and in all the above-mentioned cases no such leave is to be granted without an affidavit stating any particulars necessary for enabling the judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shewn."

POTTER *v.* CHAMBERS.

1878
Dec. 2.

par
4 C P D 384
460
4 Ex D 92

Costs—County Court Act, 1867, *s.* 5—*Balance of Claim and Counterclaim—Order XIX, Rule* 3.

The plaintiff claimed a balance of 114*l.* 8*s.*, and the defendant established a counterclaim to the extent of 109*l.* 16*s.*; whereupon the judge directed the jury (as the result of their answers to certain questions submitted to them) to find a verdict for the plaintiff for the balance, 4*l.* 12*s.*, and no order was made as to costs. The direction of the judge was not questioned:—

The Court refused to alter the findings of the jury (the judge being unable to do so), for the purpose of giving the defendant costs upon his counterclaim.

Staples v. *Young* (2 Ex. D. 324) and *Blake* v. *Appleyard* (3 Ex. D. 195) considered.

The plaintiff sued the defendant for the price of bricks supplied to him during the year 1877, amounting to 290*l.* 8*s.* at the rate of 44*s.* per thousand, giving the defendant credit for 176*l.* in respect of payments on account, and claiming the balance, viz. 114*l.* 8*s.* The defendant by his counterclaim sought to reduce the plaintiff's demand by a sum of 76*l.* for overcharges in respect of the bricks delivered in 1876 (alleging the agreed price to have been 38*s.* per thousand, and not 44*s.*, as charged), and by a further sum of 33*l.* 16*s.* in respect of those delivered in 1877, beyond the sum for which the plaintiff had given credit.

The jury, in answer to questions put to them, found that the agreed price of the bricks delivered in 1876 was 38*s.* per thousand, and of those delivered in 1877, 44*s.* per thousand, and they affirmed the defendant's counterclaim in respect of the 76*l.* and the 33*l.* 16*s.*, leaving a balance upon the whole in favour of the plaintiff of 4*l.* 12*s.*, for which sum Lord Justice Thesiger, who tried the cause, directed them to find a verdict; and he thereupon gave judgment for the plaintiff for 4*l.* 12*s.*, nothing being said about costs.

The defendant, conceiving himself to be entitled to the costs of the issue found for him upon his counterclaim, afterwards applied to Lord Justice Thesiger to enter the issues distributively, viz. 114*l.* 8*s.* for the plaintiff upon his claim, and 109*l.* 16*s.* for the defendant upon his counterclaim. His Lordship declined to do this, thinking that he had no power, inasmuch as he was not a

S C on app. pl. post. 457

judge of a Divisional Court. The defendant thereupon made a similar application to Field, J., at chambers, by whom it was dismissed, with costs, but without assigning any reason.

Peile moved by way of appeal, that the certificate of the associate might be amended by entering the findings according to the truth,—see the Form 15, Appendix B. to the Judicature Act, 1875.

[DENMAN, J. You are asking us to do something which would be contrary to the truth. The jury found nothing but "verdict for the plaintiff, 4*l.* 12*s.*;" and the judge gave judgment for the plaintiff for that sum.]

In *Staples* v. *Young* (1) the plaintiff proved a claim for 26*l.* 13*s.*, and the defendant a counterclaim of 23*l.* 1*s.* 6*d.*, and the judge at the trial directed judgment to be entered for the plaintiff for the balance (under Order XIX, r. 3), 3*l.* 11*s.* 6*d.*, and declined to make any order as to costs; and it was held that the effect of the County Court Act, 1867, s. 5, and Order LV, r. 1, of the Judicature Acts, was to deprive the plaintiff of costs. And in *Blake* v. *Appleyard* (2) it was held that, inasmuch as the County Court Act, 1867, s. 5, does not apply to counterclaims, where the plaintiff proved a claim for 40*l.*, and the defendant a counterclaim for 10*l.*, the defendant, in the absence of any order as to costs, was entitled to the costs of proving his counterclaim, and of the issues so far as they related thereto. In *Winterfield* v. *Bradnum* (3), where it was held that a defendant, who admits the cause of action sued upon, and sets up a counterclaim founded upon a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing without the jurisdiction, Lord Justice Brett says: "A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is, that they are wholly independent suits which for convenience of procedure are combined in one action. I know that a practice has arisen, that, if the counterclaim overtops the plaintiff's claim, judgment is

(1) 2 Ex. D. 324.

(2) 3 Ex. D. 195.

(3) 3 Q. B. D. 324, 326.

1878

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entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties." If *Blake* v. *Appleyard* (1) is rightly decided, the defendant is clearly entitled to his costs of proving his counterclaim.

[DENMAN, J. Is not the effect this,—The plaintiff has recovered his full claim, viz. 114*l.* 8*s.*; the defendant has established his counterclaim to the extent of 109*l.* 16*s.*, leaving a balance of 4*l.* 12*s.* in favour of the plaintiff, for which the jury have found a verdict, and the judge has given judgment, nothing being said about costs; so that neither party can get costs.]

Possibly the learned judge might have refused the defendant his costs; but he has not done so.

[DENMAN, J. referred to *Gore* v. *Baker* (2).]

G. Shaw, contrà, was not called upon.

DENMAN, J. This case has been argued as though it were a case in which the learned judge at the trial, or the jury, had obviously taken such a course as to lead to an improper entry of the proceedings so as to prevent the master from taxing the costs. I am by no means satisfied that that is so. On the contrary, the judge's notes shew this to be the state of things:—Three questions which arose in the course of the case were left to the jury, the findings upon which would enable the judge to direct the verdict to be entered one way or the other. These questions were answered in such a way as to induce the learned judge to direct a verdict for the plaintiff for 4*l.* 12*s.* The verdict was so found and so entered: and the judge gave judgment for the plaintiff for 4*l.* 12*s.*, and no order was made as to costs. Application was afterwards made to my Brother Field to do that which it was not competent to Lord Justice Thesiger to do, viz. to order the verdict to be entered for the plaintiff for the larger sum, and for the defendant on his counterclaim for the smaller sum, in order that the defendant might have his costs on the counterclaim, the plaintiff by reason of the County Court Act, 1867, s. 5, being entitled to no costs. It is obvious that that would be a very unjust result, and one to which the Court ought not to be asked to lend itself. If the learned judge did wrong in directing the jury to find for the plaintiff for the balance, that was matter of misdirection; and no motion has been made upon that ground. The learned judge declined to interfere with the costs at the time, being obviously under the impression that neither party ought to have costs. With respect to the cases of *Staples* v. *Young* (1), and *Blake* v. *Appleyard* (2), I find some difficulty in reconciling the principles upon which they seem to have been decided, though I do not say that they are irreconcileable. That is only an additional reason why we should decline to adopt a course which would lead to apparent injustice.

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(1) 3 Ex. D. 195.

(2) 4 E. & B. 474. 1 Jur N.S. 425

Lopes, J. It is unnecessary for us in this case to attempt to reconcile the two cases of *Staples* v. *Young* (1) and *Blake* v. *Appleyard.* (2) If Mr. Peile's contention is right, the defendant will be entitled to costs, but the plaintiff will not. If that be so, it seems to me that, in every case where there is a claim and a counterclaim, and the plaintiff recovers a sum which brings him within the operation of the County Courts Act, an application must be made to the judge at the trial; otherwise injustice will be done. I must confess I think it would be desirable in these cases to take a verdict both upon the claim and the counterclaim. But here we are asked to amend the entry of the verdict in a manner which the circumstances do not warrant. The learned judge seems to have told the jury that, in the event of their answering certain questions in a given way, the result would be a verdict for the plaintiff for 4*l.* 12*s.* The jury found accordingly, and the learned judge gave judgment for that sum, saying nothing about costs. I entirely concur with my Brother Denman in thinking that we ought not to interfere; and I do this the more readily as I believe substantial justice has been done. The appeal will be dismissed, and with costs.

Appeal dismissed.

Solicitor for plaintiff: *George Blagden.*

Solicitors for defendant: *Digby & Jones, for Digby & Evans, Maldon.*

(1) 2 Ex. D. 324.

(2) 3 Ex. D. 195.

[REGISTRATION CASES.*]

1878
Nov. 20.

SMITH, Appellant; WOOLSTON, Respondent.

Parliament—County Vote—Notice of Objection—Description of Qualification—Diminution of Property—Registration Act, 1843 (6 *&* 7 *Vict. c.* 18), *s.* 40; 28 *&* 29 *Vict. c.* 36, *s.* 6.

The nature of the interest of a county voter was described in the 3rd column of the register as "freehold land," and the description of his qualification in the 4th column was "Plots 166," &c. (specifying fifteen numbers) "Victoria Estate."

The voter having parted with all the plots specified, except one, which was freehold land of sufficient qualifying value, notice of objection grounded on the 3rd column, and relating to the voter's interest, was given, and objection taken before the revising barrister that the qualification was misdescribed. He, so deciding, expunged the voter's name:—

Held, first, that the barrister ought not to have entertained any other objection than the one of which notice was duly given; secondly, that as the identity of the property was not changed by the diminution of it he had power to amend, and should, under the circumstances, have amended the description in the 4th column by striking out the numbers of the plots which the voter had ceased to own.

Appeal from the revising barrister for the northern division of the county of Northampton.

The respondent duly objected to the name of the appellant being retained in the list of voters for the parish of Wellingborough in the division, and the objection was grounded on the 3rd column of the register, and related to the nature of the interest of the appellant in the qualifying property. The name of the appellant was on the list as follows:—

4628	Smith, Henry	33, Norfolk Street, Strand, London.	Freehold Land.	Plots 166, 167, 168, 169, 171, 172, 173, 174, 176, 177, 178, 179, 175, 475, 476 Victoria Estate.

It was admitted that the appellant had parted with all the plots mentioned as above in the 4th column except plot 476, and that plot 476, which he retained, was freehold land, and of sufficient qualifying value to confer the franchise. Upon this state of facts it appeared to the barrister that the freehold land mentioned in the 3rd column was not the freehold land now possessed by the appellant, and that he, the barrister, had no power to amend the 4th column as requested by the appellant, by striking out the plots which he had parted with as aforesaid. The barrister therefore held that the appellant was not entitled to be retained, as stated, upon the list of voters, and expunged his name therefrom. If that decision was correct such list as revised was to remain without alteration; if the decision was incorrect the name of the appellant, with his address and particulars of his qualification, was to be added.

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* For convenience of reference the Registration Cases for this year are collected here.

Gibbons, for the appellant. The notice of objection was to the 3rd column, in which the nature of the voter's interest was described as "freehold land." That column was, however, admitted to be correct, and so the objection of which notice was given failed. No other should have been entertained. But the revising barrister heard an objection made before him that the qualification of the voter was misdescribed in the 4th column, inasmuch as the voter had parted with portions of the property therein mentioned, although enough was left in his possession to qualify him. The revising barrister was wrong to expunge the name from the list on that ground. He had power to amend the description: *Bendle* v. *Watson* (1), and should have done so by striking out the numbers of the plots which the voter had ceased to own. The enumeration of those plots did not vitiate the description of the true and sufficient qualification. [He was then stopped.]

Horace Smith, for the respondent. First, where the objection is to the 3rd column, both it and the 4th column must be looked at to ascertain the voter's right to be on the register. The 3rd column is intended to denote the general character of the qualification, and the 4th column is a mere exposition of the third: see *Hitchins* v. *Brown* (2), per Tindal, C.J.; *Howitt* v. *Stephens* (3), per Byles, J.

(1) Law Rep. 7 C. P. 163.

(2) 2 C. B. 25, at p. 29.

(3) 5 C. B. (N.S.) 30, at p. 39.

Secondly, 6 & 7 Vict. c. 18, by s. 4, enacts that the overseers shall every year publish a notice requiring all persons entitled to vote in respect of any property within the parish who shall not be upon the register, and also all who "being upon such register shall not retain the same qualification . . . as described in such register, and who are desirous to have their names inserted in the register about to be made" to give to the overseers notice in writing of their claim. The appellant had parted with the greater portion of his land, and did not "retain the same qualification as described" in the register, and should therefore have made a new claim: *Burton* v. *Gery*. (1)

[LORD COLERIDGE, C.J. There the voter had given up his farm on the register, and had taken another farm not on the register, although the description in it of the one tenement was so general as to be applicable to either. Here the voter still holds a sufficient quantity of the land in respect of which he was placed on the register, to qualify him.

LINDLEY, J. Suppose a man who was qualified by a large farm sold one field only?]

That would be an extreme case. The farm would remain, and perhaps be sufficiently described.

[LINDLEY, J. Then, suppose having three fields he sold two?]

He ought to make a fresh claim that attention may be called to the diminution of his property, and, if it be insufficient, objection may be made. Otherwise one whose actual qualification was doubtful might, by causing it to seem sufficient on the register, prevent valid objection being taken.

"The qualification on the list which has stood the test of public inquiry and investigation having ceased on the voter's ceasing to occupy the land, upon principle as well as upon the plain natural meaning of the words of the Act, the new occupation required a new claim:" per Williams, J., in *Burton* v *Gery*. (1)

[LINDLEY, J. Would not the description "Victoria Estate" have sufficed, without any reference to plots?]

No, for as he retained but two of so many it would have been delusive. If the qualification is substantially the same, the revising barrister might, perhaps, treat it as the same. It is a matter of degree. Here, however, was a specific and precise description on the register of a large property which the voter had ceased to possess. The description was misleading, and 6 & 7 Vict. c. 18, s. 40, which enacts that the barrister shall not "be at liberty to change the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same," does not permit such an alteration as would have been made if he had struck out the numbers of the plots sold. Therefore he was right in refusing to amend.

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(1) 5 C. B. 7, at p. 13.

LORD COLERIDGE, C.J. I am not certain which of the objections in the case was taken before the revising barrister, or to which the formal objection in its terms pointed. The revising barrister says that the objection "was grounded on the 3rd column of the register and related to the nature of the interest of the said Henry Smith in the qualifying property."

But the 3rd column is "freehold land," and the objection to the nature of the interest would seem to have been that the land was not freehold, but copyhold or some estate other than freehold. If so, that objection entirely fails, as the barrister himself says, the nature of the interest being rightly described. We all have a strong opinion that it is not the duty of a revising barrister, if an objection is pointed out by notice, to allow another objection to be taken before him, because the voter may come prepared to meet the one objection, and then be surprised by another for which he is not prepared. So if the objection was to the statement in the 3rd column, the ruling was wrong. But it appears that the real objection was not to the tenancy, but to the description of the qualification in the 4th column. The description there specifies fifteen plots on the Victoria Estate, and in fact fourteen of them had been sold. One remained in the voter's possession; that one was amply sufficient to confer the right to the franchise, and the revising barrister was asked to amend the 4th column by striking out the numbers of the plots sold. He said that he had no power, but if his decision was wrong he thinks the list should be so amended. We are, therefore, to determine whether he had the power, and if he had, the amendment ought to be made. We are of opinion that he had the power. This is not a case where, so to speak, tricks are played on the register, as Mr. Horace Smith, in his very able argument, suggested might sometimes be. If there were any reason to suppose the voter had put a qualification of, say, nine-tenths on the register, when he possessed only one-tenth, and then an objection having been taken, he asked that the correction should be made, and those circumstances were brought to the barrister's notice, I should think it very doubtful whether he ought to exercise the power of amendment. But this case is perfectly bonâ fide. The voter had the fifteen plots at one time, and had from time to time sold off fourteen. I think it is difficult to draw the line where the power of amendment begins and ends. The learned counsel for the respondent was forced to say that if the voter owned fifty fields and sold one he could not ask the barrister to strike it out from the description in the 4th column, leaving the forty-nine there. Mr. Horace Smith was driven to that contention, because if he had admitted that one field would be struck out we should have asked him if two, or ten, or twenty, and so on, might be. The only line which can, as it seems to me, be drawn is where no fraud is suggested, and the voter retains a qualification clearly enough to give him a right to vote, and he retains the qualification he always had, then, I think, anything else in the 4th column may be amended by the revising barrister.

I am of opinion that the amendment asked for in this case was within the power of the barrister, and ought to have been made. His decision that he had not power to make it must, therefore, be reversed.

GROVE, J. I am of the same opinion. My attention has just been called to 28 & 29 Vict. c. 36, s. 6, which provides that, with one exception not now material, no notice of objection given under the provisions of the seventh section of 6 & 7 Vict. c. 18, "shall be valid, unless the ground or grounds of objection be specifically stated therein; and this provision shall be deemed to be sufficiently satisfied by naming the column or columns of the list on which the objector grounds his objection: provided always, that if the objection be grounded on the third column, then it shall be necessary to state in the notice whether the objection relates to the nature of the voter's interest in the qualifying property, or to the value of the qualifying property, or to both; and each of such last mentioned grounds of objection shall be deemed a separate ground of objection, as well as any objection grounded on any one of the other columns." So the objection in the present case wholly fails. I now clearly understand the framing the case, which states that the objection "was grounded on the third column of the register and related to the nature of the interest." But no objection could be maintained to that, for that the nature of the interest was "freehold land" is admitted. So far, therefore, the case is clear. Then whether the case falls within section 40 of 6 & 7 Vict. c. 18, is not quite so clear; but I think it does fall within it, and that the matter was one which the revising barrister could amend. In *Bendle* v. *Watson* (1), where the number of the qualifying house had been changed, Willes, J., said, "It is impossible to say this is a description of another qualification; it is an insufficient description of the claimant's qualification, not a description of another qualification; it is the old description, which at one time was true. Then, as respects the exception, 'except for more clearly and accurately defining the same' the same test applies; it would be a true description to a person who had left the street several years back, and a false one to a person who only knew the new state of things. Then, as to the words 'change the description of the qualification;' there, I think, 'qualification' must mean the nature of the qualification—e.g. freehold—while the object of a number is to individualise, and, perhaps, in that sense describe. I think that throughout the word 'his' governs the meaning, and as the qualification is the same, and the description one which might in one sense be true, inasmuch as it might indicate the house to some people, and there was no falsification or intention to deceive, the revising barrister ought to have amended." Assuming here that there was no falsification or intention to deceive, and that the qualification remained the same, it was freehold land, and the one plot retained by the appellant was sufficient to qualify him. The question is, whether the revising barrister had power to strike out the surplusage? I think that he had, and how his discretion might be exercised is not a matter for us. To put the case suggested by the Lord Chief Justice, suppose the voter had disposed of an insignificant part of his land, could the barrister have amended? We think that he could. The degree of alteration cannot alter his power of amendment, although it might affect the exercise of his discretion.

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(1) 1 Hopw. & Colt. 591, at p. 600; Law Rep. 7 C. P. at p. 166.

LINDLEY, J. I am of the same opinion. The statute 28 & 29 Vict. c. 36, s. 6, determines the first point. On the second, viz. the amendment, I think power is given to the barrister by s. 40 of 6 & 7 Vict. c. 18, the object of which seems to be this: that the nature of the qualification, or what is commonly called the 3rd column, must remain untouched. The "description of the qualification" of the voter, as it is called in one part of the section, or the "description of the property," must be such as that there shall be no change in the identity of the property in respect of which the claim is misdescribed. Here the claimant described the nature of his qualification rightly, viz. as freehold land; he misdescribed, or rather overdescribed, the amount of land. He overdescribed the plots, but there was no change in the identity of the land. That being so, I think the revising barrister had power to amend, and I do not feel pressed by the provision of s. 40, "that he shall not be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." Where the description is of that which remains the same, I think he may amend. Although the "Victoria Estate" had been altered by addition or subtraction, still if the identity remained the same the amendment might and ought to have been made.

Gibbons asked for costs, which the Court under the circumstances refused.

Decision reversed.

Solicitors for appellant: *Sharman & Jackson.*
Solicitors for respondent: *Lewis & Indermaur.*

1878
Nov. 28.

BENNETT, Appellant; ATKINS, Respondent.

Parliament—Borough Vote—Payment of Rates by Owner for Occupier—Allowance of Deductions—Notice in Writing—Condition Precedent—Waiver of—32 & 33 Vict. c. 41, ss. 3, 4, sub-s. 2, & s. 7.

By 32 & 33 Vict. c. 41, s. 4, the vestry of any parish may order that the owners of all rateable hereditaments of a certain value within such parish shall be rated instead of the occupiers, and thereupon: 1. The overseers shall rate the owners instead of the occupiers, and shall allow them an abatement or deduction of 15 per centum from the amount of the rate. 2. "If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated . . . . in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow him a further abatement or deduction, not exceeding 15 per centum from the amount of the rate. . . ."

By s. 7 every payment of a rate by the owner, notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purposes of the franchise:—

Held, that the notice in writing prescribed by s. 4, sub-s. 2, is a condition precedent to a further abatement thereunder, and cannot be waived by the overseers; and, consequently, that where, no such notice having been given, the abatement was allowed, and a rate, minus the amount of the abatement, paid by the owner of hereditaments in respect of which it was laid, the payment could not be "deemed a payment of the full rate by the occupier" for the purpose of the franchise within s. 7 of the Act.

Appeal from the revising barrister for the borough of New Windsor.

The respondent duly objected to the name of the appellant, being retained on the list of voters for the parish of Clewer in the borough.

The description of the appellant on the list was as follows: "77. Bennett, Charles, 91, Victoria Cottages. House, 91, Victoria Cottages." The appellant occupied, during the qualifying period, a house No. 91, Victoria Cottages, and he stated that by agreement with the owner of the house the owner paid the poor-rate thereon.

[The rating on the rate-book was here set out.]

The assistant overseer of the parish produced the minute book of the vestry, from which it appeared that at a vestry meeting held on the 11th of November, 1869, it was proposed, seconded, and ordered, that the owners of all rateable hereditaments in that parish, to which the 4th section of the Poor-Rate Assessment and Collection Act, 1869, applied, be rated to the poor-rate in respect of such rateable hereditaments instead of the occupiers; under which order of the vestry owners of property were entitled to an allowance of 15 per cent. from the full amount of rate payable by ordinary occupiers.

The assistant overseer stated that neither he nor the overseers had received any notice in writing as required by the 4th section, sub-s. 2, of the Poor-Rate Assessment and Collection Act, 1869, from the owner of the cottage No. 91, Victoria Cottages that he was willing to be rated and to pay the rates made in respect of the said cottage, whether the same was occupied or not, and although such notice had not been given, the owner had been allowed a further abatement or deduction of 10 per cent., making, together, an allowance of 25 per cent. from the full amount of rate paid by ordinary occupiers.

It was objected to the appellant's right to be on the list of voters that the extra 10 per cent. was illegal, as no notice in writing had been given by the owner to the overseers that he was willing to be rated and pay the rates in respect of cottage, No. 91, Victoria Cottages, whether the same was occupied or not, and that he had not paid an equal amount of rate in the pound to that paid by an ordinary occupier, as required by the People's Representation Act, 1867, s. 3, sub-s. 4.

On behalf of the appellant it was contended that the rate having been paid by the owner, he being rated instead of the occupier pursuant to the order in vestry, such payment by the owner must be considered as that of the occupier by virtue of the 7th section of the Poor-Rate Assessment Collection Act, 1869.

The revising barrister held that there was no proof or evidence that any written notice had ever been given by the owner to the overseers, as required by s. 4, sub-s. 2, of the Poor-Rate Assessment and Collection Act, 1869, to entitle him to the further abatement or deduction of 10 per cent., and that the extra allowance of 10 per cent. allowed by the overseers to the owner was an illegal allowance, and that the appellant had not, therefore, on or before the 20th of July last, bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates that had become payable by him in respect of the premises occupied by him up to the preceding 5th day of January, and the barrister expunged his name from the list.

If the Court should be of opinion that the amount paid by the owner after deducting the extra allowance of 10 per cent. was a legal allowance without any notice being given to the overseers, or was a sufficient payment of the rate by the appellant within the meaning of the 4th section of the People's Representation Act, 1867, sub-s. 3 (1), the name of the appellant was to be inserted in the list.

(1) 30 & 31 Vict. c. 102 (The Representation of the People Act, 1867), s. 3: Every man shall be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in parliament for a borough, who is qualified as follows; that is to say: . . . 4. Has on or before the twentieth day of July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him . . . up to the preceding fifth day of January.

32 & 33 Vict. c. 41 (The Poor-Rate Assessment and Collection Act, 1869), s. 3: "In case the rateable value of any hereditament does not exceed" 20*l.* if in London, and certain other specified sums if in Liverpool, Manchester, or Birmingham, or 8*l.* if situate elsewhere, "and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor-rates, whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding 25 per cent. on the amount thereof.

Sect. 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section three of this Act extends, situate within such parish, shall be rated to the poor-rate, in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:

"1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate:

"2. If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated."

Sect. 7: ". . . Every payment of a

The names of 229 other occupiers were expunged for the same reason, and were to be also re-inserted if the decision of the barrister was wrong. The appeals were consolidated.

Sir H. S. Giffard, S.G. (*Lewis Coward,* with him), for the appellants. The allowance was legal. It was made under an arrangement between the owner and overseers, which is rendered valid both by s. 3 and s. 4 of 32 & 33 Vict. c. 41. The general scheme of both those sections is that if the owner undertakes to pay rates for all his hereditaments, whether occupied or not, he shall be entitled to certain allowances. Sect. 3 provides for a voluntary agreement, which need not be in writing so long as he "is willing to agree in writing," should the overseers require it. Under such an agreement he may be allowed a commission not exceeding 25 per cent., the amount allowed in the present case. Sect. 4 empowers the vestry to order that the owners shall be rated instead of the occupiers, and, on such order being made, sub-s. 1 compels the overseers to rate the owners, and to allow them an abatement of 15 per cent. That abatement is merely for the trouble of collecting the amounts of the rates from the occupiers, and is not made in respect of unoccupied houses. But by sub-s. 2, if the owner shall give "notice in writing" that he is willing to be rated in respect of all his hereditaments, whether the same shall be occupied or not, the overseers shall rate him and allow him a further abatement not exceeding 15 per cent. The consideration for such allowance is the payment made in respect of vacant houses. It is consistent with the facts found, and may be

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rate by the owner whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor-rate.

Sect. 8: "Where an owner who has undertaken, whether by agreement with the occupier or with the overseers, to pay the poor-rates, or has otherwise become liable to pay the same, omits or neglects to pay any such rate the occupier may pay the same and deduct the amount from the rent due or accruing due to the owner, and the receipt for such rate shall be a valid discharge of the rent to the extent of the rate so paid."

fairly presumed from the case, that the owner has for the last ten years paid rates to the overseers for his unoccupied hereditaments; therefore the parish has had full consideration for the allowances made under an actual agreement. Moreover, the barrister does not expressly find that no notice in writing has been given at any time during that period, and therefore the Court may say "omnia presumuntur rite esse acta."

[LORD COLERIDGE, C.J. If there had ever been any such notice, and it were lost or destroyed, you could and would have given secondary evidence of it.]

The rate demanded has, at all events, been paid by the owner, and his tenants ought to have the reciprocal advantage of the franchise. That their interest has been carefully regarded by the legislature is shewn by the various sections of the Act. The occupiers, who have agreed with the owner that he shall pay the rates and deduct the amount from the rent, have no opportunity of supervising the agreement between him and the overseers. Yet it is said that the mere omission of a notice in writing from the owner to the overseers invalidates the allowance made to him, and deprives the occupiers of their votes. But the notice in writing prescribed by sub-s. 2 of s. 4 is not a condition precedent to the further abatement. It is a mere preliminary. *Durant* v. *Withers* (1) may be cited for the respondents. There however, a composition had been made which was expressly prohibited by 59 Geo. 3, c. 12, s. 23, and was illegal.

[LORD COLERIDGE, C.J. The judgment seems based on the inequality of the rate paid rather than on the illegality of the composition.]

It is not a decision on 32 & 33 Vict. c. 41, s. 4. In *Reg.* v. *The Mayor and Assessors of the Borough of Kidderminster* (2), Erle, J., held that the title of the occupier to be on the burgess-roll would not be destroyed by a mistake in the composition between the owner and overseers. The Court had regard to the intention of the statute, which is to facilitate the collection of parish dues, and to protect the occupier's franchise. The composition is settled by the agreement, and that may be verbal. It supersedes the notice. Here was an effective agreement acted upon by all parties for many years. The omission of a preliminary cannot avoid it. The overseers waived the notice.

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(1) Law Rep. 9 C. P. 257.

(2) 20 L. J. (Q.B.) 281.

Kingdon, Q.C., for the respondents. The case is clear. This allowance by the overseers was unauthorized, for the conditions on which alone they were empowered to make the deductions from the full rate were not fulfilled. Sect. 3 does not apply. It relates to the case of voluntary agreements, which are evidently to be in writing; sect. 4 provides for compulsory rating of the owners by order of vestry, and a reciprocal right to deductions. When so rated the owner is absolutely entitled under sub-s. 1 to an abatement of 15 per cent. And by sub-s. 2 he can entitle himself to a further abatement if he shall "give notice to the overseers in writing" that he is willing to be rated for all his hereditaments, whether occupied or not. A written notice is an essential condition to the validity of the abatement. It is necessary as evidence of his consent. Suppose, being rated in respect of a vacant house, he refused to pay, and when summoned, proved that the house was empty; the overseers could justify the rating by production of the written notice, and the magistrates would enforce payment. A notice is required, as being more simple than an agreement, and needing no stamp. But it must be in writing, as the section expressly provides. *Durant* v. *Withers* (1) is in point. There the Act said that no deduction should be allowed; here the Act says, in effect, that no deduction shall be allowed, except after notice in writing. The irregularities are similar, and the deduction in both cases is invalid. The overseers acting for the parish could not waive the statutory requirement.

Sir H. S. Giffard, S.G., replied. There may be two agreements in two sets of circumstances, under sects. 3 and 4. Sect. 7 says that payment under those agreements shall be deemed payment of the full rate, and sect. 8 entitles the occupier himself to make such payment if the owner omits to do so. Such payment having been made, the occupier must be deemed to have paid an equal amount in the pound to that payable by other ordinary occupiers. It might be that the landlord has had so many houses vacant that, he has, notwithstanding the abatements, actually paid an amount proportionately larger in respect of his whole estate than the

(1) Law Rep. 9 C. P. 257.

sum paid by ordinary occupiers in the parish, and yet the tenants of his occupied houses are said to be disfranchised for want of a formality which has been dispensed with.

By sect. 28 of the Representation of the People Act, notice of a rate in arrear and due from the landlord must be given by the overseers to the occupier, that he may pay it and save his vote. And in *Flatcher* v. *Boodle* (1), when a tenant had not received such notice, the Court held that, although the rates were unpaid, he was entitled to his vote, because he had not been called on to pay. Rogers on Elections, 12th ed. p. 103, after citing the case, writes, "It would seem that unless this notice is duly served, the voter would be entitled to be registered, although he had not paid." Sects. 7, 8, and 19 of 32 & 33 Vict. c. 41 shew how careful the legislature has been to preserve the franchise to occupiers while providing for the collection of the rates. It would be contrary to the spirit of the Act to disqualify them here.

LORD COLERIDGE, C.J. Although the fact is not stated expressly, I assume it to be found in the case that notice in writing has never at any time been given by the owner to the overseers; for it is impossible to suppose that, in a case so important, both parties would not have brought evidence upon the point if there were good reason to suggest that such notice had actually existed.

Then, no notice in writing having been given, the question is whether the deduction of 25 per cent. which has been made from the rating of the owner can be justified. This depends on the construction of 32 & 33 Vict. c. 41. It is true that the person who will be affected by the non-payment of the proper amount of the rates is not the owner, but the occupier of the hereditament, and it may be said that a judgment disfranchising the appellant and many other voters, does so for causes which they were unable to prevent, because, not being parties to the arrangement between their landlord and the parish, they had no means of knowing whether the enactment under which it was made had or had not been complied with. The first answer is that we have nothing to do with the effect of the Act; we have only to construe it.

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(1) 18 C. B. (N.S.) 152.

The consequences, if opposed to public policy, must be altered by the legislature. The second, and, perhaps, better, though more narrow, answer is that this Act of Parliament gives to the voter privileges with respect to the rating portion of his franchise which, without the Act, he would not have, and as he takes the benefit he must bear the burdens of it.

Then are these deductions proper? I rather doubt whether on the true construction of the case too much has not, in any view, been deducted from the rate, because, as I gather from the case, the only objection made before the revising barrister proceeded on the 2nd sub-s. of s. 4, and no question was raised on s. 3. I doubt whether, at any rate as to 10 per cent. of the allowance, the case does not find the appellant out of court. But I do not wish to decide that question, for I am clearly of opinion that whether the case be regarded as arising on the 2nd sub-s. of s. 4, or on that section and on the 3rd section taken together, my judgment must be equally adverse to the appellant. The 3rd section [his Lordship read it] provides that where, irrespective of any action by the parish itself in vestry, an agreement between an owner and the overseers is entered into in writing to a certain effect, then the rates may be received from the owner and the 25 per cent. allowed him. The 4th section deals with another state of things, and enacts that the vestry of any parish may order that the owners of all hereditaments to which s. 3 extends shall be rated instead of the occupier. So far, that provision applies only where the hereditaments are occupied, and when they are so it directs that the owner may be rated in invitum. But the 2nd sub-section says that if the owner "shall give notice to the overseers in writing that he is willing to be rated" in respect of all such rateable hereditaments, whether the same be occupied or not, the overseers shall rate him accordingly, and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated. The provision contemplates that the vestry has made an order that owners shall be rated instead of occupiers. This may be done without consent of the owners, but when the owner gives notice to the overseers that he is willing to be rated in respect of all hereditaments, whether occupied or not, then the overseers shall rate the owner, and he shall be entitled to the further deduction. Now, I will assume that there is no agreement in writing, and no notice in writing. I am of opinion that the entering into an agreement in writing in the 3rd, and the giving notice in writing under the 4th, are conditions precedent to the allowance to the owner whether under ss. 3 or 4 of the Act. I think that the 3rd section clearly contemplates an agreement in writing existing before an allowance can be made, and that writing is the foundation of agreement under s. 4. The construction of the 4th section is this: By 43 Eliz. c. 2, the overseers have power to rate. But they must rate all equally, and if they do not, their rate is bad. By 32 & 33 Vict. c. 41, they may rate certain persons unequally, but must pursue the conditions prescribed by the statute, and if they do not pursue them the rate is bad. Here they have rated unequally, but they have not pursued the statute, which says that if the owner shall give notice in a certain way, viz., in writing, he shall be allowed a further deduction of 15 per cent. He has not given notice in writing, and the overseers have allowed him the deduction. They construe the sub-s. 2 as if it provided that whether he gives notice in writing or not they shall rate him and make him an allowance. I am reluctant to be led into the consideration of what is called the intuitus, or purpose, or spirit of an Act of Parliament, when such consideration would compel me to do violence to the words of it. The words here are plain, they seem to me to give the overseers power in a particular event and not otherwise; that particular event has not arisen in this case, and therefore they have no such power. It has however been suggested that the overseers may waive the notice in writing. I do not find any provision enabling them to do so. They are not private persons discharging a private duty, but public persons discharging a public duty; and it is plain that if no notice in writing existed they and the parish might be drawn into constant disputes. It might well be the intention of the legislature that the overseers should not be able to waive it, and I think they are not able to do so. This conclusion derives considerable support from the terms of the 7th section as to payment of rates to qualify for the franchise. The first part of the section is as to payment by the occupier, which is not this case; and as to payment by the owner, "every payment by the owner whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise, which, as regards rating, depends upon the payment of the poor-rate." If therefore the owner pays the whole rate, or by agreement with the occupier and overseers pays something which is not the whole rate, still it is to be taken for the purposes of the franchise as the full rate. But what are the conditions? He must pay it with such deductions "as the overseers are empowered to make," but if he does not pay the full rate, or pays the rate with such deductions as the overseers are not empowered to make, then he has not paid the whole. Were the overseers here empowered? It appears to me that under the Act they are required to be empowered by law, not by agreement which could not be recognized. The general law says the overseers must rate equally. The particular Act says they may rate unequally, subject to certain conditions. If they do not fulfil these conditions they are not empowered. These are such deductions as the overseers were not empowered to make, and therefore the rate was not paid, and the decision of the revising barrister must be affirmed.

GROVE, J. I also am now of opinion that the decision must be affirmed; but during much of the argument the leaning of my mind was against the appellant, because it was said by the Solicitor General at the outset, and apparently acquiesced in by the learned counsel for the respondent, that the agreement mentioned at the end of the 3rd section as an agreement with the overseers, might, within the Act, be an oral agreement, and need not be an agreement in writing. That had two effects on my mind. Reading the first words, in case the owner of the hereditament "is willing to enter into an agreement in writing," and then passing to the words "the overseers may . . . agree with the owner," I thought that, whatever might be the case as to the notice, the agreement itself might be a verbal agreement; and, supposing that to be so, then, as ss. 7 and 8 used the words "agreed" or "agreement," that, although in the 4th section no express agreement is mentioned, the operation of ss. 7 and 8 depended, not on any preliminary matter to agreement, but on an agreement between the owner and overseers, either within the express terms of s. 3, or the contemplation of s. 4, sub-s. 2, an agreement which need not be in writing.

But, reading the Act more carefully, it appears to me that s. 3 does require an agreement in writing. The words "and the owner of such hereditament is willing to enter into an agreement in writing" would come to little, if taken alone, for the owner might verbally express his willingness; although it would seem a strange provision of the statute that a mere intimation of will or desire by the owner to enter into an agreement in writing should be effective as a verbal agreement. The language "willing to enter" might, indeed, be more clear; but when I read the following words it seems to me that an actual agreement in writing is intended, and that the power of the overseers depends on it, and not on mere willingness of the owner to enter into such agreement, because the section proceeds "for any term not being less than one year from the date of such agreement." There can be no date if there is not an agreement, and the agreement must be "such agreement," and there can be no such agreement but that previously referred to, which is "an agreement in writing." The provision appears to me to be that, on his entering into an agreement in writing, the overseers, subject to the control of the vestry, may receive the rates from the owner and allow him a commission. I think the section requires an agreement in writing. So construed it gives a different character to the intention of the legislature as expressed in both s. 3 and s. 4, for it tends to shew that the overseers before they can acquire power to rate the owner instead of the occupier, or to allow him further abatement, shall have, in the one case, a definite agreement in writing, and in the other a definite consent in writing from the owner; and it gives, also, a different intuitus to the word "agreed" in s. 7 and "agreement" in s. 8, because they must then be read with reference to the previous provisions, and therefore must mean the agreement in the 3rd section.

Now, in s. 4 [his Lordship read it] an agreement on both sides in writing is not required, and probably for this reason, viz. that, whereas in s. 3 an agreement in writing is required before the overseers are obliged to rate the owner and make him an allowance, s. 4 is imperative on them; after the order of the vestry they must rate him, and must, if he performs a certain condition, make him a further allowance, so all that is needed is an undertaking on behalf of the owner expressed in writing. The statute may require evidence of such consent on the part of the owner, which the overseers might not be willing to act on if it was optional. But the legislature says that the owner shall be able to compel the overseers to make the further abatement. What is optional between them need not be in writing, viz. the amount of the abatement. So construed, the statute has a sensible meaning, and to give it another would be to depart from the plain one. In the first case, where it is optional in the overseers to rate and allow abatement to the owner, an agreement in writing is prescribed; in the second case, where it is imperative on them to do so, a document in writing is required by the statute. Thus the notice becomes something more than a preliminary matter which can be waived, it is a requsition of the statute, for with that statute another is to be complied with. The legislature seems to wish the overseers to have a voucher from the landlord. It would be doing violence to the statute to say that the two requirements of an agreement in writing under s. 3 and a notice in writing under s. 4, sub-s. 2, are not substantial requirements necessary to carry out the intention of the Act. Suppose years to elapse, and no document in writing between the owner and overseers, both parties might be dependent on oral evidence, and great hardship and inconvenience might result. Therefore I think the requirement in each of these two sections is an absolute requirement, and that such a requirement cannot be waived by the overseers acting for the public. The power of allowing deductions depends on the fulfilment of the statutory conditions; here they have not been fulfilled, and therefore the decision of the revising barrister was right and should be affirmed.

LINDLEY, J. I am of the same opinion. The question is whether the appellant is entitled to a vote, he not having himself paid any rates for the house he occupied. But has any one else paid them for him so as to make the payment a payment by him?

Has the owner, his landlord, paid the rate, properly payable for his occupation? That depends on two points, first, the true construction of 32 & 33 Vict. c. 41, ss. 3, 4, and secondly, on the power of the owner and overseers, both or either, to waive what, for the moment, I will call the formality of a written notice. On the true construction of sects. 3 & 4, I do not think there can be any difference of opinion. The Act is an enabling Act. It enables persons who have not paid their rates to enjoy the franchise on certain terms and conditions. The 3rd section applies to an agreement between an owner and the overseers. I am quite at a loss to understand why the phrase "willing to enter into an agreement in writing" is used, nor have I heard any explanation given of it. The language is strange in form. But having regard to the word "date" of the agreement, I have not a doubt that the construction by my Lord and my Brother Grove is right, and that it means where there is an agreement in writing between the owner and overseers. It is quite impossible to give effect to the whole of that section without so reading it. With respect to s. 4, the language is comparatively free from ambiguity, and no doubt what was contemplated was that the owner should be rated before any deduction was made. That is not quite exhaustive or conclusive of the matter, because it may be said that whereas an owner who had not given notice in writing could not require the benefit of the Act, and on the other hand, where there was no notice in writing the overseer could not make him the allowance, it does not follow that by some agreement that formality could not be waived; but I do not think there could be a waiver in this case.

Apart from the question of waiver, the construction seems plain. This is an Act enabling certain things to be done in a certain way, which could not previously have been legally done at all. Sect. 7 throws light on sects. 3 and 4, and tends to shew that the occupier of a house cannot obtain the franchise unless he proves that the owner has paid the rate for him. The owner here has not paid it for him; so the conditions on which alone the occupier can obtain the franchise have not been complied with. That brings me to the last point, whether it is competent for the overseers to waive the conditions. I thought there was much to be said in favour of that view at first, because of the Solicitor-General's suggestion that the notice in writing was only a preliminary form, and that the substance of the enactment is that the overseers are intended to make allowances of 15 per cent. in consideration of the owner allowing himself to be rated for empty houses, if any ; and inasmuch as he had allowed himself to be rated, and the overseers had been benefited, it was more equitable to treat it as a mere form which might be waived. But the answer is that the overseers are not dealing with matters affecting themselves, but are representatives of the parish and of all persons therein entitled to the franchise, and it may be expedient to the parish to acquiesce in a great abuse of power if this formality were neglected. There would be nothing to prevent the overseers making allowances where they ought not so to do unless they had an agreement in writing. It might lead to consequences extremely painful and disastrous to the parishioners and involve them in endless lawsuits. So on the broad ground that the overseers are representatives of the parish, and have no power to waive such conditions as these, and that it would be unsafe to say they might be waived, I think there was no waiver. It is true that I was party to a recent decision apparently in conflict with this, where, in deference to authority, we held that overseers could waive. But our reason for so holding was that it was impossible to construe the Act of Parliament otherwise.

There is no such language here, it would be too dangerous to say in the present case that the statutory requirements can be dispensed with, and I cannot see how we could rightly say the overseers could dispense with them.

The Act has not been complied with, and the appellant is not entitled to the franchise.

Appeal dismissed.

Solicitor for appellants: *Phillips.*
Solicitor for respondent: *T. Durant.*

[END OF REGISTRATION CASES.]

1878
Nov. 25.

BLAKE *v.* THE ALBION LIFE ASSURANCE SOCIETY.

Evidence—Fraud by Agent of Company for their Benefit—Knowledge of Company—Proof of other Frauds—Course of Business.

In an action against a company to recover a sum of money obtained by them from the plaintiff, through a fraud of the defendants' agent committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge, and for the benefit, of the defendants is admissible on behalf of the plaintiff.

Claim: In November, 1874, the plaintiff, a clergyman living in Norfolk, saw an advertisement in a newspaper inserted by one Henry Howard, an agent of the defendants, offering to lend money upon personal security. The plaintiff applied to Howard by letter requesting a loan of 1500*l.*, and received the following reply:

"11, Euston Square, London, N.W.
"21 Nov., 1874.

"Dear Sir,—I can entertain your application for an advance of 1500*l.* 0*s.* 0*d.* for three or fourteen years at 4 per cent. interest per annum, payable half yearly. The 1500*l.* 0*s.* 0*d.* to be repaid in one sum at the end of the term.

"You will have to insure your life in an insurance office, to be selected by me, for 1500*l.* 0*s.* 0*d.*, and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep for the benefit of your relatives. Let me know per return of post if this meets your views.—Yours truly, "H. Howard."

The plaintiff called at the office of Howard on two occasions, but on neither did he see him, but only saw his manager, who, on the last occasion, agreed, on behalf and by the authority of Howard and the defendants, to lend the plaintiff, who agreed to borrow from Howard, 1500*l.* upon the condition that the plaintiff would insure his life in the defendants' office, and pay them a premium for such insurance, and would deposit the policy with the defendants as security for the repayment of such loan with interest, and the manager, on behalf of and for Howard and the defendants, agreed that no other security than the policy should be required from the plaintiff.

The plaintiff accordingly applied to the defendant company to effect a policy of insurance on his life, which they accordingly did effect upon the payment by the plaintiff to the defendants of the sum of 59*l.* 6*s.* 3*d.* The plaintiff informed Howard that he had so insured his life, and forwarded to him the company's receipt for 59*l.* 6*s.* 3*d.* to shew that he had done so, as agreed.

Howard, instead of advancing the 1500*l.* as agreed, sent to the plaintiff the following letter:

"11, Euston Square, 21 Jan. 1875.

"Dear Sir,—By book-post you will receive draft securities as prepared by my solicitor, for your perusal and approval, which please return to me at your earliest convenience, with any comments you may have to make indorsed thereon.—Yours truly,

"H. HOWARD."

The draft securities mentioned in the letter were—(1) a bill of sale of furniture, (2) a guarantee of two sureties for the repayment of the loan, (3) an assignment of the policy, (4) a bond for the amount to be advanced, to be signed by the plaintiff, (5) a declaration as to debts to be made before a bench of magistrates sitting for the division of Norfolk. Upon the receipt of this letter the plaintiff made several efforts to see Howard, but failed.

The plaintiff was unable to procure the loan, or any part of it, notwithstanding his performance of, and readiness to perform, the agreed conditions, and the defendants and Howard had not and never intended to advance the loan.

The arrangement between the defendants and Howard was that Howard should be the pretended lender of the money, and as if he had no connection with the said office.

The defendants and Howard, by the contrivance appearing in the claim, fraudulently induced the plaintiff to pay the 59*l.* 6*s.* 3*d.* upon the pretence that the sum of 1500*l.* should be advanced to him upon the terms agreed and hereinbefore set forth, whereas in fact they never intended that the sum should be advanced, and always intended without any notice to the plaintiff to demand securities which they knew he would not give or agree to. After the receipt of the 59*l.* 6*s.* 3*d.* by the defendants, the same was divided between the defendants and Howard. Howard, as the defendants well knew, was wholly unable, from his circumstances, to pay any sum of money recovered from him, and with the knowledge and contrivance of the defendants changed his name and address from time to time.

The policy was effected by the plaintiff, and the premium paid only for the purpose of procuring the loan, and for no other purpose whatsoever, of which the defendants always had knowledge, and there never was any consideration whatever for the defendants retaining the 59*l.* 6*s.* 3*d.* The policy lapsed before this action.

Every matter and act done by Howard or his manager were done for and on behalf, and with the sanction of, and were ratified by, the defendants, and Howard and his manager were in all things their agents to carry out the contrivance to procure them the premium of 59*l.* 6*s.* 3*d.*, there being no intention at any time, either by Howard or the defendants, that the loan of 1500*l.* should be advanced.

The plaintiff claimed the 59*l.* 6*s.* 3*d.*, and also the expenses he had been put to in endeavouring to procure the advance to him of the 1500*l.*

The plaintiff further prayed that the policy might be declared void, and cancelled on the ground of fraud, and that the premium was obtained by fraud.

DEFENCE: The defendants denied the agency of Howard or his manager, their knowledge of the alleged fraud or any connection whatever with him; and admitted only the making of the policy and payment of the premium, alleging that it was paid as the first year's premium on the policy, and no other premium was ever paid; that the year expired and the policy was not kept up; that there was good consideration for the defendants retaining the premium, and the plaintiff had the benefit of the insurance until the policy lapsed.

ISSUE thereon.

At the trial, before Lord Coleridge, C.J., the plaintiff proved the negotiations for the loan; the insurance and payment of the premium, and the requisitions for other securities than the policy, as alleged in the claim.

The evidence of several other persons from whom money had been obtained under similar circumstances was then tendered on behalf of the plaintiff to prove a system of fraud; that Howard was a secret agent of the defendants, and that they had obtained the money paid to them by the plaintiff through the fraud of Howard committed for them and with their knowledge. This evidence was objected to, by counsel for the defendants, but the learned judge admitted it. The substance of it was as follows, viz., that advertisements signed either Howard, Gard, Wood, Rogers, Preston, Seymour, Holland, or some other name, and often expressed in the identical words of the advertisement seen by the plaintiff, appeared offering an advance of money; that the witness placed himself in correspondence with the advertisers, insured his life in the office of the defendants, and paid them a premium, which they divided with the person who had offered the loan; that unreasonable requisitions for further securities were made and the loan never advanced; that the policies were not renewed by the insurer; that they would not have been paid had they fallen in; that the names of the advertisers were all aliases of a man called "Wood," who was constantly for hours together, and, week after week for years had been, in close communication with the managing director and secretary, and sometimes other directors of the company; that cheques drawn in favour of Wood, Gard, or Rogers, or of the other different names, were all indorsed with the respective names in the handwriting of Wood. The jury found a verdict for the plaintiff for the sum claimed.

A rule for a new trial having been granted on the ground of misreception of evidence,

Willis, Q.C., and *Tindal Atkinson*, shewed cause. The action is to recover money obtained by means of a conspiracy to defraud, and the nature of the conspiracy is described in the claim. The evidence objected to was material to prove the conspiracy, and to substantiate the particular issues raised on the pleadings. It was necessary and admissible to support the allegation in the claim that Howard, with the knowledge and contrivance of the defendants, changed his name and address from time to time, and

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also that he was their agent, and for a long while in secret communication with them. The course of business was so arranged by the defendants and Howard that an isolated transaction such as that with the plaintiff might seem, or at least be plausibly declared to be, fair. But evidence of several other similar transactions was cogent proof of the fraudulent nature of that one which by itself appeared legitimate, or, at worst, ambiguous. When the substance of this evidence was stated in certain paragraphs of the claim they were struck out by this Court; and, rightly, because they violated the rule against pleading evidence: *Blake* v. *Albion Life Assurance Society.* (1) But the evidence was properly received at the trial. It was material to the issues: *Reg.* v. *Tyson.* (2) The defendants will contend that the evidence might have been admissible in an action against the individual managers and directors of the insurance office, but was not so as against the company itself. But the company is liable for the fraud of its agents committed in the course of its business. An action of deceit may be maintained against it and money fraudulently obtained for it be recovered: *Mackay* v. *Commercial Bank of New Brunswick* (3), and the evidence here was given to establish the facts creating that liability.

McIntyre, Q.C., and *Patchett, Q.C.*, in support of the rule. The evidence was inadmissible. The claim alleges certain representations and acts of Howard known to the company. The evidence in question was of transactions between persons other than the plaintiff, and persons other than Howard. This is an attempt to prove the fraud of one man on another by shewing the frauds of others on others. The course of business of the defendants in transactions with different persons was not relevant to the cause of action, nor even evidence to support it, as the Lord Chief Justice and Mr. Justice Brett said in *Blake* v. *Albion Life Assurance Society.* (1)

[LORD COLERIDGE, C.J. If our observations there were, in effect, only that you cannot prove one offence by merely proving another, they are right, but will not assist the argument. If they convey the idea that, to complete the chain of proof in a case of fraud, other like frauds by the same offenders cannot be shewn by evidence, our ruling was wrong, and I will not be bound by it.]

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(1) 45 L. J. (C.P.) 663.
(2) Law Rep. 1 C. C. R. 107.
(3) Law Rep. 5 P. C. 394.

On the trial of a man for burglary in one county the prosecution could not give evidence of burglaries committed by him in another. It is not just that persons who come to answer a specific charge should be surprised by accusations which they are unprepared to meet. Even if the evidence could have been given in an action against those officers of the company who were shewn to have been connected with Howard, it was not admissible against the defendants. "An incorporated company cannot, in its corporate character, be called upon to answer in an action for deceit:" per Lord Cranworth, *Western Bank of Scotland* v. *Addie.* (1)

[LORD COLERIDGE. But this is an action to recover money obtained by fraud.]

Then it cannot be maintained, for the plaintiff has had the benefit of life assurance during a year, and there can be no restitutio in integrum. The reasoning on which in *Barwick* v. *English Joint Stock Bank* (2) principals are held liable for the frauds of agents has been lately declared to be unsatisfactory: see per Bramwell, L.J., *Weir* v. *Bell.* (3)

GROVE, J. (after relating the substance of the claim) said: Shortly stated, this is an action for money had and received without consideration, and obtained by the fraud either of the defendant company itself, or of persons who transacted the business of and for the benefit of the company; and, even if treated as in one sense an action of deceit, the claim is not made for damages occasioned by the deceit, but for a return of the money which the plaintiff has paid, and the expenses. No doubt, on the cases, there may fairly be a question whether an action of deceit could be brought against an incorporated company, or whether a person could recover damages against a company by merely shewing fraud of its agent, without knowledge of the company. But it is admitted, or clearly said, in the authorities, that where a company has obtained a benefit through the fraud of an agent, the person defrauded may recover back his money from the company; so the plaintiff had to prove here that he paid his money in consideration of certain statements and acts of the secretary, directors, and managers of the company; that the circumstances under which they got the money were fraudulent; that the transaction was not bonâ fide, but a fraudulent transaction to get his money without any consideration; and that the money found its way into the coffers of the company. Of all those elements in his case, except the fraud itself, there was strong and unquestionably admissible evidence at the trial. Therefore, if that money which went into the coffers of the company was obtained by fraud of the manager of the company, the plaintiff would be entitled to recover. But the difficulty in the plaintiff's case was how to prove that fraud. How was he to shew that the transaction, which looked honest, or, at worst, equivocal, was in fact fraudulent?

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(1) Law Rep. 1 Sc. & D. 145, at p. 166.

(2) Law Rep. 2 Ex. 259.

(3) 3 Ex. D. 238, at p. 244.

In the mere facts that Howard, by requiring further securities, virtually broke his undertaking to grant the loan, and received from the company part of the premium for introducing the insurer, there was nothing conclusive of fraud, or so pregnant with it that a jury might properly be expected to find a verdict of fraud in the case. Then, on behalf of the plaintiff other evidence was tendered for the purpose of satisfying the jury of fraud, and that the money was never intended to be lent; that the transaction was not bonâ fide; that the policy was not a real but a sham one, and that the amount due upon it would never have been paid to anybody. Now, these facts would not appear upon the face of the transaction between the plaintiff and Howard. But on behalf of the plaintiff evidence was tendered in order to prove in addition that Howard was an alias, and perhaps a mere fictitious name which the company made use of. The defendants contend that this evidence is inadmissible; that the plaintiff is not entitled to shew general transactions on behalf of the managers of the company by which they have both in this and in other similar cases put forward a fictitious or unreal name, and obtained money on the faith of exactly similar promises of loans which they have never advanced to the persons to whom they promised them; that they never repaid to the parties the amounts paid on the policies of insurance, though it had been demanded upon the conditions not being fulfilled on which the promise was first made; and that in the large majority of cases, if not in all, the policies were never renewed after the year, and the premiums dropped into the hands of the company. The plaintiff offered to prove that general dealing, and, further, that not only was Howard a fictitious name, but that precisely analogous transactions went on with eight or ten other fictitious names, none of them shewn to represent a true person, several of them admitted by the secretary and manager of the company to be fictitious persons, and that other intending borrowers were thereby defrauded of money. Was that admissible evidence or not? I am of opinion that it was admissible. It was admissible, firstly, upon the logical ground that in a vast number of cases such evidence is the only means of establishing fraud. Very many fraudulent transactions are apparently fair until the fraud is shewn by proving virtually what has happened,—the real facts underlying the evident ones; and one great element of fraud is the intent of the parties. The jury had to consider the question, Did the defendants or their managers do this through the fictitious name of Howard, for the purpose and with the intent of defrauding the plaintiff of his money; and did they ever intend to pay the money back again under any circumstances? Intent, motive, design, and complicity, together with acts, may shew fraud. It seems to me that if evidence of this kind were inadmissible, fraud would frequently never be proved. A man might commit fraud upon twenty different persons by begging letters or otherwise, and, if a single letter to one individual only were proved, the evidence would probably be insufficient to convict him upon. But if it were proved that he had written similar letters to twenty persons; that he had received money from them on promises to return it which he had never fulfilled; that he told fictitious stories, and gave false names, the jury would doubtless be satisfied of his guilt in the particular case.

Then, secondly, is there any rule of law rendering this evidence inadmissible? I am of opinion that there is none. I think that when a person is alleged to be guilty of an offence which per se cannot be brought home to him by proving his mere act without explaining his animus, purpose, or object in doing it, the law permits evidence of other acts done by the same person to be given, for the purpose of such explanation. No less than three reported cases establish the proposition that even in trials for murder evidence of other acts ending in murder, acts, for example, of poisoning, will be admitted to shew the intent with which the act charged was done, and that the administration of the poison in the particular case was not accidental but designed.

In other criminal cases where intent is likewise the gist of the offence, such evidence is undoubtedly admissible. A man cannot be properly convicted of uttering counterfeit coin merely because he has paid away a bad shilling, for any one may happen to receive a bad shilling in change and to pass it without any wrongful intent. It must be shewn that the accused acted with knowledge that the coin was bad. This may be proved by evidence that he did similar acts and under similar circumstances, so as to bring the fraud home to him. There is no difference that I am aware of between the rule in civil and in criminal cases on this subject. The criminal law, having regard to life and liberty is, if anything, more strict than the civil. I find nothing in principle or law to satisfy me that the evidence was not admissible. I will assume that Henry Howard was the person who committed the fraud, and that it was to be brought home to him. Then I apprehend that, his transaction with the plaintiff being ambiguous on its face, no one could reasonably dispute the admissibility in evidence of other acts of Henry Howard of the same sort with other persons of identically the same character, which, if they were wholly severed from the particular transaction, might not be admissible. Evidence may be given of other acts if they are sufficiently connected with the case, to shew that Henry Howard in doing the act with which he was charged did intend and did commit a fraud, or, at all events, they are evidence which the jury might reasonably consider to bear out the inference that he committed a fraud. If that be so, the next step is to ask, Can this evidence be given as regards a third person? Without saying that the assumption may not be wrong, I will assume for the present that if the managers of the company had been merely proved to have been guilty of similar frauds unconnected with the fraud upon the plaintiff, otherwise than by their resemblance in character, they might not have been admissible. That appears to have been in my Lord's mind when the motion came before this Court to strike out from the statement of claim allegations of other transactions. But here the other frauds given in evidence are identified with the person or with the fictitious name, by whom or through which this fraud was committed. Suppose Howard to be proved to be an agent of the defendants, and that he committed a large number of these frauds by which the defendants profit, and that it can be shewn, by giving evidence of these frauds, that the defendants perfectly well knew they were frauds, and that Howard was the man who committed them for their use, and that the managers—I will not say the defendants, but the managers of the defendants—accepted the profit of them, and got money from the persons defrauded through the agency of a real man Howard. It appears to me that then the evidence is admissible, because that which, taken alone, might have been an honest transaction becomes evidently fraudulent upon proof of other similar transactions being shams, and that the defendants by exactly the same means had pocketed large sums of money; the difficulty arising from possibility of mistake in the case is removed; and further, a fact which cannot be shewn by the evidence of a single transaction is also proved, viz., that by a similar series of frauds the defendants have put money into their pockets which they ought not to do, and therefore the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff. Principle is in favour of the admissibility of the evidence. No case has been cited to the contrary, while a variety of cases—particularly the criminal ones which I have mentioned—shew that such evidence is admissible to prove intent or fraud, and that the transaction was not bonâ fide.

Another branch of the subject now presents itself. Howard might be a real name of the agent, but might also be a fictitious one, as indeed was, I think, in fact established. Then it seems to me that the evidence would be admissible on another ground, viz., to satisfy the jury that the transaction was a fraud, because the defendants or their manager had for the purpose of obtaining money used a fictitious name. The use of one such name might perhaps be plausibly explained by the defendants imputing it to mistake, and to their belief that the man's name really was Howard, although the plaintiff proved that Howard was not the name of the man. Could not then the plaintiff proceed to shew that the explanation was fallacious, by proving that Howard was only one fictitious name, and that the defendants had dealt with A. under the name of an agent called Howard, with B. under the name of an agent called Gard and so on? Would not that be evidence for a jury tending to prove that the name Howard was a fraudulent fiction, that the use of it was not a mistake, but part of the fraud concocted by the defendants, and that they did business under fictitious names? How could this be shewn otherwise? The plaintiff proposed to bring the case home to the company by proving first, that they knew Howard was a false name, and secondly, that the very same man they called Howard they also called Gard, Rogers, and those various other names. I fail to see why that evidence was not admissible. It formed a very material part of the evidence given. All the evidence given would be in my mind clearly admissible for the purpose of shewing that they entered in their books different names, all of which were proved to be fictitious.

But let me regard the case from another point of view. Suppose there were no real man in the transactions whom these names were said to represent, and that they were wholly fictitious; that there was no Howard, Gard, Rogers, Brown, &c., but that a clerk or a porter of the defendants was kept at some house in Euston Square, who merely forwarded letters addressed to Howard or Gard, or any of those names, on to the managers of the defendants. That may possibly be the truth. Suppose, then, that was the state of fact, as it certainly was, with respect to a large number of these fictitious names, is not a party in an action for fraud to shew that his correspondent was a fiction, or none other than the managers and directors of this company, who always corresponded under fictitious names to get money into the hands of the company without themselves being liable, and to keep out of danger of discovery? Howard did not represent himself in any way as an agent of, or in connection with, the insurance company, and I can think of no rational argument against the admissibility of the evidence offered to shew that the manager and secretary of the company were trading with the public—not as the Albion Insurance Society, but—as persons having a direct interest in the receipts, through another person unconnected with the company, who asked proposing borrowers of money to insure their lives in a company, to be named by Howard, or whatever the fictitious name was. Such a request from a money lender would seem natural; it is a common and very reasonable practice for the borrower of money to be required to insure his life in a company approved by the lender.

It would therefore be a natural supposition of the plaintiff that Howard desired an insurance in a good solvent company, and that there was nothing novel in his making it a condition of the loan that the plaintiff should insure in a company to be named by Howard.

I think the plaintiff was clearly entitled to shew, not only that Howard was connected with this insurance company, but that the insurance company were the principals and were the persons committing the fraud. I am quite convinced that the evidence was clearly admissible.

Great doubts, even more than doubts, might be raised if this case were an action against the company for deceit. The statement of claim certainly does allege fraud and deceit by Howard as well as by the company; in substance, however, it is not a claim founded upon deceit, but a claim for the return of the money which has been obtained from the plaintiff by the deceit. There was ample evidence to shew that the money went into the pockets of the company. Whether he is entitled to recover the whole of the 59*l.*, or part of it, or part of the expenses, is not the matter before us on this rule. *Western Bank of Scotland* v. *Addie* (1) affords authority for saying that the plaintiff can recover in this action money received from him by the defendants, through frauds of their agent, committed for their benefit. I think the evidence was rightly received, and that the rule should be discharged.

LINDLEY, J. I am of the same opinion. This is an action by the plaintiff to recover his money which the defendants have got. He says that he was induced by the fraud of a person called Howard to pay the money to them, that at the time they took it they knew that the plaintiff had been so induced by Howard's fraud to pay it; and that under those circumstances the defendants cannot retain the money. The question is, how is such a case to be proved? We are asked by the defendants to shut out all evidence tending to shew the nature of the business which the company carried on, and to confine our view simply to what took place between the plaintiff on the one side and Howard and the company on the other. That is to say, we are asked to exclude all light, but that which the particular transaction throws upon the case. There is no principle to justify our doing so, and to ask us to do so is startling. The plaintiff proved what took place between him and Howard and the company. Nothing could seem, at first sight, more plain and straightforward, and there would be no appearance of fraud; but then the plaintiff proposed to adduce evidence to shew that the transaction was one of a fraudulent class. Was he, or was he not, to be precluded from doing it? I think that he was quite at liberty to put his case in that way, and could only do so by going into a great number of other transactions having some features in common with this. I agree that in order to prove that A. has committed a fraud on B., it is neither sufficient nor even relevant to prove that A. committed fraud upon C., D., and E. Stopping there, I admit that proposition. But let it be shewn that the fraud on B. is one of a class of other transactions, having common features, then I disagree altogether with that proposition. The plaintiff had to make out that Howard, whoever he was, induced him to part with this money upon what is in substance a false pretence, the false pretence being that he would get a loan if he did certain things. Was he not at liberty to shew falsity of that pretence by proving that Howard was in the habit of carrying on business in that way, and got money from A., B., C., and D. under the same false pretence that he would procure loans when he never intended to procure, and never did in fact procure them? Further, the plaintiff offered to shew that the directors and managers of the defendants' business well knew the conduct of Howard, and the mode in which he induced people to come to the company's office to insure. If such evidence is to be excluded, it must be under some strict rule which has not been pointed out, and which

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(1) Law Rep. 1 Sc. & D. 145.

I do not see the expediency of inventing. The question, when closely examined, appears to be whether by enlarging the view light can be thrown on the true nature of the transaction, which, taken by itself, may be innocent or may be fraudulent? I think this may be done. The answer to the objection that evidence of frauds on other persons cannot be admitted, is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of that false pretence on the part of the defendant company, and the moment that is shewn the plaintiff's case is established. I do not think it necessary to decide the point as to the liability of companies for frauds of agents. All we have to consider is whether this evidence was admissible in an action of the present kind. For the reasons I have given, in addition to those of my Brother Grove, I am of opinion that the rule must be discharged.

LORD COLERIDGE, C.J. I am of the same opinion. Interesting and difficult questions have been raised which must be decided when necessary, but which for the purposes of to-day I do not think it necessary to decide, or even consider. The rule is before us on one single ground, and the whole question now depends on that single issue, viz., was evidence improperly received at the trial? No other point is open to the defendants, and we have none other to decide. To arrive at a proper conclusion we must look at the claim in support of which the evidence was tendered. It may be that there might have been an objection to the claim; that is one of the points which appear to me not to arise. The judge at Nisi Prius has to look at the claim as it stands to see if the evidence is properly receivable in support of it. Now the general outline of the fraud was this: There is an insurance company, there is a person not a member of the insurance company, nor apparently an agent of it, a person called by various names whom, for purposes of convenience in this judgment, I will call Howard. Howard advertises a loan of money. The plaintiff is induced by the advertisement to enter into negotiations for a loan. Howard, as part of the terms of the loan, insists on insurance for a year in the defendant company's office, and the insurance is to be effected and the premium paid down before the loan. The insurance is effected and the premium paid, and outwardly there is no connection between the company and Howard. After the premium is paid and the receipt of the policy by the plaintiff, the conditions which the jury have found to be unreasonable and really fraudulent—conditions to which no one could be expected to conform—were added to the terms on which the money was to be advanced and on which no money was advanced. The premium had been paid and the policy effected. An action is brought to recover the money paid under those circumstances. So stated there is obviously nothing which might not be perfectly bonâ fide. If Howard, instead of requiring the insurance to be effected in the Albion, had required it to be effected in some well-known office of high repute, the plaintiff would, doubtless, have put up with the loss of the premium, thinking it absurd to suppose or assert that there could be any connection between such an insurance office and Howard, or that any one would believe it. And if this insurance with the Albion had been an isolated transaction no jury would have found a verdict for the plaintiff. But, from circumstances which revolving years brought to the attention of the plaintiff, he was satisfied that, although no outward connection existed, there was a most intimate real connection between Howard and the defendants; that the transaction between himself and Howard was quite well known to the defendants; that they had got the benefit of the premiums through arrangements between Howard and themselves; that it never had been contemplated by the defendants or Howard that a farthing's worth of the benefit should accrue to the plaintiff, but that the whole reality of the transactions should be payment of a premium, which premium was divided in equal shares between the defendants and Howard. That came to his knowledge, and also it came to his notice that this was the course of business carried on for years with the knowledge of the defendants, and greatly to the benefit of the directors by obtaining in large numbers the premiums on those policies of which there was no renewal, and on which the premiums were paid. Now if that state of things could be shewn, and the substance of it is stated in the claim, it would be wasting words to declare it to be a gross and abominable fraud; and it is said that although, if such state of things could be proved, it would be a gross and abominable fraud, and the only way of shewing it to be so would be to shew that it was not an isolated case, but one of a class effected for years in great numbers through the same instrumentality, and with the same knowledge on the part of the defendants, yet the rules of evidence absolutely prevent that being shewn. Some years ago, as great lawyers then complained, the rules of English evidence, professedly on the ground of excluding all possibility of prejudice, bias, or error, made inadmissible the evidence of any persons having the slightest interest in the case, and many claims perfectly just and fair were defeated for want of that evidence. Such was then the law; but it is altered, and, with a few exceptions on the ground of public policy, now is, that all which can throw light on the disputed transaction is admitted—not of course matters of mere prejudice, nor anything open to real moral or sensible objection, but all things which fairly throw light on the case. And in any but an English court, and to the mind of any but an English lawyer, the controversy whether this evidence is or is not evidence which a court of justice should receive would seem, I think, supremely ridiculous, because every one would say that the evidence was most cogent and material to the plaintiff's claim. But, of course, some legal ground for receiving it must be shewn. I think it was admissible on two distinct and definite grounds. The defendants' company are sued in fact to rescind the contract, and to get back the money which has been obtained by that contract, because the contract was fraudulent, and obtained by fraud of their agent. Two things were therefore necessary to be established—agency and fraud. I do not say first agency and secondly fraud, because I hardly know which one logically stands first. Now, except as to Howard, the agency was beyond controversy. The secretary, manager, and two or three other persons were manifestly agents to effect insurances. They were agents of the company to effect its business, and it is said that, according to well-established rules, the company is responsible for what these agents do in the discharge of their duties of agency. That is clear with respect to every one but Howard. It is at first doubtful as to Howard, but it appears to me that you can shew the agency of Howard by this evidence none the less because in proving a fact necessarily relevant to the plaintiff's claim you must necessarily prove matters also prejudicial to the conduct of the defendants. And in this case it seems to me that the evidence was clearly admissible for the purpose of proving the agency, of Howard. [His Lordship related the substance of the evidence as hereinbefore set out.] It was surely cogent evidence to shew that this man Howard, whom no one ever saw, was Wood; that Wood was an agent of the company; that the mode in which he transacted this business was well known to its directors; and that the company in case after case benefited by his frauds; and thus his agency, and the communication between him and the company in the particular case under discussion, was established in the ordinary way, by proving repeated acts of agency.

For, directly it is shewn that Howard was the person represented by the six or seven different names, and that for a number of years and under those names this business was conducted for the benefit of the company, who received the money and passed it to their account in the bank, I think it vain to contend that such evidence is not admissible as evidence of the agency of Howard. That is one ground of admissibility. But agency would not be sufficient, because, this being an action against the company, the plaintiff must shew that the fraudulent acts of the agent were either done with the knowledge, or at least in the service of the company, and were acts of which the company got the benefit. This second point is shewn by the same evidence which establishes the first. There remains the point whether those acts were fraudulent in fact. Was the act in this particular case of that character? The observation of my Brother Lindley is irresistible; suppose this transaction with the plaintiff had stood alone, no one would say that it, while isolated, was conclusive, or even, perhaps, very strong evidence of fraud on the part of the company, but when it appears that the person passing under the different names was one and the same agent, and that the character of his acts must, from their repetition and the way in which they were disguised, have been known to the defendants, and that the acts all ended in the getting of money from persons without the least corresponding benefit to them, I think it is proved that the acts were fraudulent in their nature; and then the two points which the plaintiff had to make out, viz., that Howard was the agent who committed the frauds, and that by those frauds obtained money which the company had, and by which they benefited, are made out. For the reasons already stated by my Brothers Lindley and Grove, I think that the case does not fall within the rule excluding res inter alios acta; the facts given in evidence were so in one sense, but they were not tendered for the purpose of prejudice; they were tendered to make out the necessary links in the chain of the plaintiff's proof in this action. If so, are they within the authority of *Blake* v. *Albion Life Assurance Society?* (1) I do not think they are. It has been admitted in argument that the decision of that case is one with which no one can be dissatisfied. Certain paragraphs were struck out from the claim, and I think rightly struck out, and they will be seen to be open to the objection that they contain statements of res inter alios acta, without any attempt to connect the res inter alios acta with the necessary links in the proof of res inter partes acta which have to be proved. The language of the two judges who first expressed their opinions in that case might, perhaps, have been more cautiously expressed, but regard must be had to the subject then before the Court and the terms of the paragraphs. I do not think that the decision need bear on this. If it did I should be the first to withdraw from it. Indeed, at one time I thought it might bear the construction put on it by Mr. M'Intyre, and did not hesitate to say that if so it was wrong, and ought not to be followed. But I think that a more lenient interpretation which has already been hinted at, and of which the words are at least patient, may be put upon it when the decision is hereafter cited. I think this evidence was properly received, and that the rule should be discharged.

Rule discharged.

Solicitor for plaintiff: *J. Robinson.*

Solicitors for defendants: *Phelps, Bennett, & Woodforde.*

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(1) 45 L. J. (C.P.) 663.

1878 ✓
Dec. 17.

SMITH, GALE, AND FRENCH *v.* RICHARDSON.

Pleading—Joinder of Plaintiffs—Claim for Price of Goods and on Bills given for it—Embarrassing—Orders XVI., XVII., XXVII. Rule 1.

W.N. (1875) (GF4 349; 352

A claim in which the vendor of goods and the indorsees of a bill given by the purchaser to the vendor for the price jointly sue the purchaser to recover the price and also upon the dishonoured bill is embarrassing, and may therefore be struck out.

Motion on appeal from a decision of Field, J., at chambers.

The writ in the action was specially indorsed under the Bills of Exchange Act (18 & 19 Vict. c. 67) with a claim of 59*l.* 18*s.* 3*d.* principal and interest due on a bill of exchange drawn by French on, and accepted by, the defendant. The writ originally was issued in the names of the plaintiffs Smith and Gale only, who were indorsees of the bill, but was amended under a master's order by adding the name of the plaintiff French.

The plaintiffs then delivered a statement of claim, which alleged that the plaintiff French had sold goods to the defendant in respect of which 90*l.* was due on the 3rd of January; that on that day French drew, and the defendant accepted, a bill of exchange for 53*l.* 14*s.*, which was indorsed to the other plaintiffs, Smith and Gale, and subsequently dishonoured, and that another similar bill was given by the defendant for the same sum with the addition of expenses, and indorsed to the plaintiffs Smith and Gale; that "this bill became due on the 17th of August, 1878, but the defendant has not paid it, nor has he paid for the goods in respect of the price whereof the said bills were drawn and accepted," and the plaintiffs claimed 60*l.* 0*s.* 4*d.*

An order made by a master that the claim should be struck out on the grounds that it was embarrassing, and did not correspond with the claim on the writ, and that the plaintiffs were not entitled to join the claim for goods sold with the claim on the bill, was affirmed by the learned judge.

A. G. McIntyre, for the plaintiffs. First. The objection that the claim does not correspond with the writ cannot be maintained. When once a statement of claim is delivered amendment of the indorsement on the writ is unnecessary: *Large* v. *Large* (1).

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(1) Weekly Notes (1877), p. 198.

Secondly. Although the writ was issued under 18 & 19 Vict. c. 67, the Bills of Exchange Act, yet as soon as an appearance was entered the orders and rules of the Judicature Acts applied. See *Oger* v. *Bradnum* (1) and *Norris* v. *Beazley* (2); although, prior to appearance, the procedure under the Bills of Exchange Act must be strictly observed: *Pollock* v. *Campbell* (3).

Thirdly. The addition of French as plaintiff was not resisted at the time the order to add him was obtained. So the defendant is estopped from complaining of it. But even if not estopped he cannot support any objection to the joinder.

[DENMAN, J. Another plaintiff could not be added under the Bills of Exchange Act after appearance.]

But by the Judicature Acts, Order XVI., rule 1: "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he may be entitled to without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the action shall otherwise direct."

In one action under the Bills of Exchange Act a defendant was added: *Anon. Case* (4); and, in another similar action, a plaintiff: *National Bank of England* v. *Bradley* (5). It must be admitted that the defendant will succeed against one or other of the plaintiffs. But they are entitled to make their alternative claims, which need not necessarily be consistent: see *Child* v. *Stenning* (6), a decision on rule 3 which applies to joinder of defendants similar language to that used in rule 1 with regard to plaintiffs. These claims originate in one contract, and it would be inconveniently multiplying suits if two actions are brought.

Dickens, in support of the order. The objection to the claim is that it is bad on its face, for no cause of action by French is shewn therein. He indorsed the bill of exchange away, and, not being the holder, cannot sue on it, and having taken it in payment and received value on it, has been paid for the goods, and cannot recover the price of them.

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(1) 1 C. P. D. 334.

(2) 2 C. P. D. 80.

(3) 1 Ex. D. 50.

(4) Weekly Notes (1876), p. 23.

(5) Ibid. 66.

(6) 5 Ch. D. 695.

[DENMAN, J. But non constat that the bill was taken in payment; and it has been dishonoured.]

The defendant is not bound to demur on those grounds. He is embarrassed by the double claims; a plea of payment for the goods will be no answer to the indorsees of the bill, and payment into court would be thrown away. Such alternative claims cannot be joined under the Judicature Act and Rules. To justify joinder there must be either identity of parties or of subject matter. See Mr. Wilson's note to Order XVI. (2nd ed. p. 187). Here there is neither. Order XVI. deals only with parties. In *Child* v. *Stenning* (1) there was a legal relationship. The plaintiff was lessee of the person added in an action of trespass to which the defence of a right of way granted by that person was set up. So in *Honduras Ry. Co.* v. *Tucker* (2), the agent who had made the contract sued on was added, that the plaintiff might claim against him in the alternative for breach of warranty of his authority to bind the principal defendant. But it is not in every case, even of alternative claims, that joinder can be allowed: see per Cockburn, C.J. (3)

Order XVII. deals only with joinder of causes of actions. That they must be between the same parties is implied in Rule 1, and may be inferred form the subsequent Rules. Identity of subject matter in this action cannot be established by reverting to the goods in respect of which the original liability of the defendant was created. If all the plaintiffs could sue on the bill there would be identity of parties. But they cannot. French is not the holder of the bill, and his co-plaintiffs have no connection with the goods, but took it as an ordinary negotiable instrument.

PER CURIAM. The joinder seems embarrassing, we will hear the reply on the third point.

McIntyre, replied. The plaintiffs will not be embarrassed. If the defendant paid money into court it could only be taken out with the consent of all. Suppose he pleads that he did not accept the bill and did not have the goods. The jury could be asked the two questions raised on these issues. He could not be liable to pay the bill, and also for the goods. The plaintiff French would be estopped by his claim from recovering for the goods if the jury found that the defendant accepted the bill, for the plaintiff binds himself by the allegation that it was indorsed over. The question of convenience was considered in *Child* v. *Stenning* (1), and Jessel, M.R., says, that the difficulty arising from different causes of action is provided for by rule 1 of Order XVII., enabling the Court to order separate trials.

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(1) 5 Ch. D. 695.

(2) 2 Ex. D. 301.

(3) 2 Ex. D. 301, at p. 305.

DENMAN, J. I think the appeal must be dismissed. One ground on which the learned judge affirmed the master's order that the statement of claim should be struck out was that he thought it was embarrassing, and, looking at all the circumstances of the claim itself, it appears to me that it is so. Other points have been argued, one of which was that where an action is once properly commenced under the Bills of Exchange Act and an appearance entered, then all the provisions of the Judicature Act giving powers of amendment, adding parties, &c. apply. The case of *Norris* v. *Beazley* (2) was cited, in which I, perhaps incautiously, expressed a rather extrajudicial opinion that the Judicature Act applied after appearance to a writ issued under the Bills of Exchange Act. I do not recede from that opinion, for, as at present advised, I see no reason to do so in a simple ordinary case between A. and B., where A. sues under the Bills of Exchange Act, and B. is let in to defend, and subsequently proceeds, raising any defence he may have. I thought I was then acting on the principle of *Oger* v. *Bradnum* (3), and may have been right or may have been wrong. But it is quite another thing to say that all the provisions of the Judicature Act apply, so that a new plaintiff, who was not a proper plaintiff under the original provisions of the Bills of Exchange Act, may be brought in. I should rather reserve my opinion on such a new and important point. Then, another point argued was, whether in any case the plaintiff French could be brought in and added as plaintiff under the Judicature Act, or could join with the other two plaintiffs;—whether, supposing the proceedings had never been under the Bills of

(1) 5 Ch. D. 695.

(2) 2 C. P. D. 80.

(3) 1 C. P. D. 334.

Exchange Act, the powers of Order XVI. and Order XVII. apply. That also need not be decided, and it is better to express no opinion on it, but I may say that there is much force in the argument used to support the note to Order XVII., rule 1, in the valuable edition of the Judicature Act (2nd. ed. p. 187), by Mr. Arthur Wilson, who sums up his reasoning thus: "Order XVI. dealing with parties assumes an ascertained subject-matter. Order XVII. dealing with subject-matter assumes ascertained parties. There must, therefore, either be identity of subject-matter, in which case Order XVI. gives ample liberty in the choice of parties; or identity of parties, in which case Order XVII. gives a like liberty in the choice of subject-matter;" and Mr. Dickens argued forcibly, and with great appearance of reason, that this is not a case which comes within the limitation so put on those two orders. It is difficult to see how the plaintiff French, suing for the original consideration of a bill of exchange of which he was drawer and the defendant acceptor, has any relations whatever at law with subsequent indorsees of it for some consideration not at all connected with the original consideration for the goods. They seem as independent parties, and as different causes of actions as could be conceived, except so far as relates to the original supply of the goods by French to the defendant. But even if there may be some cases in which such power of joinder would be allowed under the Judicature Act, I think the learned judge at chambers was quite right in saying it could not be so in this statement of claim, when the consequences are considered, without considerable embarrassment on the part of the defendant, because he would doubtless be much puzzled to know how to pay money into court or to apportion his rights against the several plaintiffs so as to meet the claims, and would certainly be likely to be prejudiced in the fair trial of the case by having to go into many nice questions—whether, for instance, the goods were equal to sample, or as to the conduct of the defendant with regard to them—wholly unconnected with the bare question of acceptance or non-acceptance of the bill raised by the indorsees. So whatever be the whole rights of the plaintiffs under the Bills of Exchange or Judicature Acts, or however the one Act may apply to the other, I think that the case is one in which the judge

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SMITH v. RICHARDSON.

in chambers was right in not allowing the claim to stand in a form which would embarrass and prejudice the fair trial as between the defendant and the parties now on the record. I think the statement of claim should be struck out. Mr. McIntyre contends that the plaintiff received it at an earlier day without objection. Probably the defendant might have resisted the application to add French, and did not do so; but that does not, in my judgment, prevent him from objecting to the statement of claim when it is amplified and embarrasses him.

LINDLEY, J. It is unnecessary to express an opinion on many important matters discussed in this case, having regard to the facts and to the consequences which would follow at the trial were the claim allowed as it stands. I think that it is embarrassing, and should be struck out. I will only add that in this case, it appears to me, there is no identity of parties nor identity of causes of action; and, if called on to express an opinion, I should think the case not one to which Orders XVI. and XVII. were meant to apply.

Appeal dismissed.

Solicitor for plaintiffs: *J. G. Shearman.*
Solicitor for defendant: *Robinson.*

1879
Feb. 2.

[IN THE COURT OF APPEAL.]

THE LONDON AND BRIGHTON RAILWAY COMPANY *v.* WATSON.

Railway Company — Bye-law, Validity of — Passenger travelling without a Ticket—Penalty—Railway Clauses Consolidation Act, 1845 (8 *Vict.* c. 20), *ss.* 103, 109, 145.

7QBD345

A bye-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey."

By s. 109 of the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20) bye-laws are authorized to be made, and by s. 145 penalties for forfeitures imposed by bye-laws are recoverable before justices:—

Held, that the above bye-law did not create a debt recoverable in a Court of civil jurisdiction.

APPEAL from the judgment of the Common Pleas Division in favour of the defendant. (1)

Action by the plaintiffs to recover from the defendant the balance of a railway fare from New Croydon to Lower Norwood, two stations on the plaintiffs' railway.

The defendant was a second class passenger on the plaintiffs' railway from Norwood Junction to Lower Norwood, and travelled without having taken any ticket. On his arrival at Lower Norwood he was unable to produce and give up his ticket, but offered to pay the fare from Norwood Junction to Lower Norwood. This was refused by the plaintiffs' ticket collector, who demanded the fare from New Croydon to Lower Norwood, New Croydon being the station whence the train originally started.

The plaintiffs relied on the following bye-law:—

Bye-law No. 1. No passenger will be allowed to enter any carriage used on the railway or to travel therein upon any railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket (whether a contract or season ticket, or otherwise), to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of the journey.

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(1) 3 C. P. D. 429.

1878. Dec. 20. *Jeune,* and *T. Mosley,* for the plaintiffs.
Macmorran and *Macaskie,* for the defendant.

Cur. adv. vult.

Feb. 1. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRAMWELL, L.J. If the sum claimed in this case is a penalty, it is not recoverable in the county court nor elsewhere than before justices, as provided by 8 & 9 Vict. c. 20, s. 145. For it is the case of a liability created by statute, with a special provision for its enforcement, and with provisions inconsistent with there being a concurrent jurisdiction in the ordinary courts, see s. 151: *Cates* v. *Knight.* (1) Accordingly it was argued for the plaintiffs that it was a fare and not a penalty, and thereupon recoverable not before justices as a penalty, but as a debt in the county court. I am of opinion that it is not a debt, that the plaintiffs have no power to create such a debt. The statute, see s. 109, gives power to enforce bye-laws only by a penalty against the offender. We have no doubt that a railway company may demand and insist on payment before taking a passenger, and that if they give him credit for his fare they may insist on any sum they think fit, and if he agrees to it that would be a valid debt, and recoverable as such. But if the passenger does not agree to it he may indeed be a trespasser in getting into the carriage, and liable to damages as such, or they may waive the tort and recover the fare on the quantum meruit scale; but they cannot fix and insist on a fare at their pleasure. In this case it is only 1*d.*, but if they can fix it at their pleasure they might make it 5*s.* or 5*l.* They have not sued for a trespass or tort, but for a fare. They have not shewn, and of course could not shew, that the defendant ought to pay more than the

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(1) 3 T. R. 442, and see Lord Coleridge, C.J., 3 C. P. D. at p. 432.

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London and Brighton Railway Co. v. Watson.

ordinary fare, consequently they fail, and the judgment should be affirmed.

My Brother Brett wishes to add to this, that in his opinion the claim is based on that which is repugnant to the statute, inasmuch as the statute only authorizes the exacting of an additional sum in the case of fraudulent conduct. Cotton L.J., and myself desire it to be understood that we express no opinion either one way or the other on that matter.

Judgment affirmed.

Solicitors for plaintiffs: *Norton, Rose, & Brewer.*
Solicitor for defendant: *H. J. Smith.*

Feb. 25.

SHAW and Others v. THE EARL OF JERSEY.

0ChD507
1ChD12

Injunction—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8*—Landlord and Tenant—Restraining Distress—Terms of—Payment of Rent into Court.*

An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the Court shall think just," under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.

The terms and conditions which the Court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was paid into court.

affirmed by C.A. appl post 89.

Motion referred from chambers, for an injunction to restrain the defendant from distraining for certain rents and royalties.

The plaintiffs were assignees of a lease of the 1st of April, 1849, whereby the predecessors in title of the defendant demised lands and mines, and two furnaces thereon for ninety-nine years, and the lessees covenanted to pay a certain rent, the same to be in lieu of royalty for all or any of the coal, iron ore, and ironstone to be used and consumed in the two furnaces then erected; and also to pay to the lessor for and in respect of the coal, iron ore, ironstone, and fireclay to be used and consumed in each and every additional blast iron smelting furnace to be erected in the demised premises the yearly rent of 250*l.*, the same to be in lieu of royalty for all or any of the coal, iron ore, ironstone, and fireclay to be used and consumed in each and every such additional blast iron smelting furnace as aforesaid, and to be paid half yearly.

Additional blast furnaces were erected but afterwards pulled down. The defendant claimed and distrained for rent in respect of the abolished furnaces.

The plaintiffs brought two actions for wrongful and excessive distresses, and, alleging that the defendant threatened again to distrain for rent due, and as it became due, in respect of the said furnaces, claimed an injunction until the hearing and determination of a special case, which was being stated, to raise the question of the liability of the plaintiffs to pay the rent under the lease.

Harrison, Q.C., and *C. A. Anderson*, for the plaintiffs. An apparently unreasonable and ill-founded claim is made by the defendant to payment of large sums as rent in respect of furnaces not in existence. The plaintiffs dispute his right to the rent. An action is pending to try it, and meanwhile the defendant threatens to distrain for the very matter in dispute. The plaintiffs ask that he may be restrained from doing so. The jurisdiction of the Court of Chancery to grant injunctions was formerly limited; the Common Law Procedure Act, 1854, s. 79, gave to common law courts more extensive powers, and an injunction might under it be granted to restrain the defendant in an action from the repetition, continuance, or committal of any wrongful act, upon such terms as to the Court should seem " reasonable and just," s. 82. Then came the Judicature Act, 1873, transferring the jurisdiction to the High Court of Justice; and sect. 25, sub-sect. 8, enacting that "a mandamus or an injunction may be granted .... by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient." (1) "The only addition is that in the Judicature Act you have just or convenient; not that that would be convenient which was unjust; but that in ascertaining what is 'just,' you must have regard to what is convenient," per Jessel, M.R.: *Beddow* v. *Beddow* (1). The power is now practically unlimited. Once the Court would not restrain libel. Now they will do so.

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(1) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8: A mandamus may be granted by an interlocutory order of the Court "in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just. . . ."

[PER CURIAM: In *Saxby* v. *Easterbrook* (2) Lindley, J., pointed out that the Court of Chancery would formerly have restrained a libel found by a jury to be a libel.]

"If the right at law is clear, and the breach of that right is clear, and serious damage is likely to arise to the plaintiff if the defendant is allowed to proceed with what he is doing or threatens to do, or has given notice of doing, an injunction will be granted pending the trial of the right. . . . But if the right at law is not clear, or the breach is doubtful, and no irreparable injury can arise to the plaintiff pending the trial of the right, the case resolves itself into a question of comparative convenience and inconvenience, whether the defendant will be more damnified by the injunction being granted, or the plaintiff by its being withheld." Kerr on Injunctions, 2nd ed. p. 119. In *Gordon* v. *Cheltenham Railway Company* (3) a question litigated between the plaintiff and the defendant, turned on the construction of an Act of Parliament, and pending the determination of it, an injunction was granted by Lord Langdale, restraining the company from using a certain engine-house and buildings which might cause annoyance to the plaintiff. "The Court," said Lord Langdale, M.R., "has regard to the circumstances of each case. Sometimes it finds it most conducive to the justice of the case to grant the injunction at once, putting the party who has obtained it on terms to bring an action to support his right; . . . . sometimes, from the great inconvenience, and at other times from the extreme doubt, it has been considered it would be best, on the whole, that the injunction should be suspended till the right at law has been determined."

[LORD COLERIDGE, C.J. But here the plaintiffs are interfering to prevent the exercise of a legal right in a matter which they must admit to be doubtful.]

The balance of convenience is in their favour. Frequent distresses may injure their credit. It is for the defendant to shew that the money is in peril.

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(1) 9 Ch. D. 89, at p. 93.

(2) 3 C. P. D. 339, at p. 343.

(3) 5 Beav. 229, at p. 239.

C. E. Bowen, for the defendant. If the plaintiffs are eventually held to be right in their construction of the lease they will no doubt be entitled to a perpetual injunction. The present question, however, is, whether a tenant apprehending a distress and denying his liability, can deprive his landlord of the exercise of a legal power arising from their contract. No case can be cited in which a landlord has been enjoined from distraining. The landlord is entitled to distrain. He will do so at his peril. It is "just and convenient" that he should be allowed to pursue his common law remedy. Is he to be kept out of his rents for a long time until the litigation has perhaps been decided by the House of Lords? If he is prevented from distraining, his rents may ultimately be lost. In *Sanxter* v. *Foster* (1) an attempt was made by a tenant of a farm to restrain the enforcement of a penal rent reserved by the lease, and Lord Cottenham, L.C., said, "The Court ought not to interfere for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same position, in the event of his turning out to be right as if the Court had not interfered." Here the money should be paid into court: *Whitworth* v. *Rhodes* (2); upon the usual conditions of a replevin bond that the action shall proceed without delay.

C. A. Anderson, replied. The plaintiffs are entitled to an unconditional injunction. It would be a hardship to impose on them the terms of paying a large sum of money into court where it will be unproductive. Admitting that no authority for restraining a distress can be cited, yet the Judicature Act has enlarged the powers of the Court and enabled it to grant an injunction in the present case.

LORD COLERIDGE, C.J. Grave legal questions may be raised as to the construction of this lease on which I give no opinion. The present application is for an unconditional injunction against a landlord claiming to exercise a legal right, viz. the right of distress, an old, and by some persons deemed to be, an unjust right, which,

(1) 1 Cr. & P. 302, at p. 303.

(2) 20 L. J. (Ch.) 105.

however, exists in our law. The counsel for the plaintiffs admit that they cannot produce a single instance, prior to the Judicature Acts, of a Court of Equity restraining a landlord from distress even when a tenant has asserted, as in very many cases he must have done, that the right of distress was unjustly claimed.

I can find no precedent in favour of the application. But under the Judicature Act an injunction may be granted "upon such terms or conditions as the Court shall think just." It is just that we should ensure the landlord having his rent if he is entitled to it, and place him in such a position that if he is not entitled to it the tenant can get it back again. I think the money should be paid into court, although I cannot and do not order it to be so. But it seems to me "just" to restrain the defendant from distraining for a fortnight, and if at the end of a fortnight the rent is brought into court, and so on from time to time, to continue the injunction; if, at the end of a fortnight the money is not brought into court, to dissolve the injunction.

DENMAN, J. I am of the same opinion. The money need not lie idle, for I think that on the joint application of both parties the Court would allow the sum paid in to be invested at interest during the litigation.

Order accordingly.

Solicitors for plaintiffs: *Argles & Rawlins.*
Solicitors for defendant: *Freshfield & Williams.*

HARRIS *v.* WARRE.

1879
March 6.

Pleading—Claim—Libel—Defamatory Words not set out—Malicious Prosecution—Charge to Police—Demurrer—Judicature Act, Order XIX., rules 4, 24.

WN (1879) 15 [illegible] 310

14 Cox Cas 172

A claim alleged that the defendant wrote and sent to a chief constable letters charging the plaintiff with a murder, and required his arrest: also, that the defendant sent to a superintendent of police charging the plaintiff with the murder, and required his arrest; and that the superintendent, in consequence, endeavoured to arrest the plaintiff on several occasions, but was unable to meet with him; that the defendant had no reasonable or probable cause for making the charge, and the same was false, and made maliciously and with intent to injure the plaintiff, whose credit and reputation were thereby injured.

On demurrer:

Held, that the claim was bad; because, if it was for libel or slander, the defamatory words were not set out, as, even in pleading under the Judicature Act, they ought to be; if for malicious prosecution, none had been instituted before a judicial officer.

Claim: that the plaintiff was a farmer, and the defendant a rector in Somersetshire.

In June, 1878, Frederick Merry, a packer in the employ of the Great Western Railway Company, was found dead on the railway between Taunton and Watchet, and at the inquest held on the body of Merry a verdict of accidental death was returned.

The defendant subsequently wrote and sent to the chief constable of the county letters in which he charged the plaintiff with having been concerned in or guilty of the murder of the said Frederick Merry, and required the chief constable to cause the plaintiff to be arrested on such charge.

The defendant also sent to the superintendent of police for the district wherein the plaintiff resided, and charged the plaintiff with having been guilty of the murder, and required the superintendent to arrest the plaintiff upon the said charge.

The superintendent of police, in consequence thereof, endeavoured himself to arrest the plaintiff, and directed a police constable to proceed to the plaintiff's residence and to arrest and detain the plaintiff upon the said charge of murder so made against him by the defendant.

The police constable accordingly on several occasions went to the plaintiff's residence and endeavoured to arrest him, and would have done so but that he was unable to meet with the plaintiff.

The defendant had no reasonable or probable cause for making the said charge, and the same was false, and was made by the defendant maliciously and with intent to injure the plaintiff.

By reason of the said wrongful and malicious acts of the defendant the plaintiff's credit and reputation had been greatly injured, and the plaintiff had suffered great loss and injury.

The plaintiff claimed 1000*l.* damages.

DEMURRER, on the ground that no prosecution of any kind was shewn, and that if the plaintiff meant to complain of libel or slander the words ought to have been set out, and on other grounds sufficient in law to sustain the demurrer.

Bray, for the defendant. First. If the claim is for libel it is bad, because the defamatory words are not set out. The authorities establishing this proposition have been lately reviewed and confirmed in *Bradlaugh* v. *The Queen* (1); that, indeed, was a criminal case, but there is no difference between civil and criminal pleading in this respect. Amongst those cases were *Cook* v. *Cox* (2), an action for slander; and *Wright* v. *Clements* (3), an action for libel. "In actions for libel," said Lord Tenterden, "the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading": *Wright* v. *Clements* (4). The Common Law Procedure Acts made no difference, but merely disposed of prefatory averments in libel. Nor have the Judicature Acts or Orders altered the law. Order XIX., rule 24, allows documents to be abstracted in pleading "unless the precise words of the document or any part thereof are material." But here they are material, and therefore within the exception.

Secondly. If the claim is for malicious prosecution, it does not allege the necessary facts to support the action, which cannot lie unless proceedings have been taken before a judicial officer: *Austin* v. *Dowling* (5).

(1) 3 Q. B. D. 607.

(2) 3 M. & S. 110.

(3) 3 B. & Ald. 503.

(4) 3 B. & Ald. at p. 506.

(5) Law Rep. 5 C. P. 534.

[LORD COLERIDGE, C.J., cited Starkie on Slander and Libel, 2nd ed. vol. i. p. 445: "The declaration must shew: 1st. A prosecution instituted and determined. 2ndly. That the defendant acted maliciously and without probable cause in the prosecution of a false charge. 3rdly. The damage resulting to the plaintiff."]

Petheram, for the plaintiff. First. If no right of action is stated in the claim it discloses a wrong without a remedy. A letter containing a charge of murder is written to the police, and has its effect. But the plaintiff cannot get sight of the words in the letter. He therefore states the substance. Surely that claim will be made out if the superintendent when called as a witness at the trial, although he may have destroyed the letter and forgotten the words, states that they amounted to a charge of murder.

[LORD COLERIDGE, C.J. A similar case came before us where the recipient of a libellous letter would not disclose the contents to the plaintiff, who thereupon asked us to order its production. We could only say that the plaintiff must declare as best he could, and if there was a variance between the libel laid in the declaration and the words proved at the trial, he must request the judge to amend it.]

The Judicature Act, Order XIX., rule 4, has removed the necessity for setting out the exact words: "Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies." The "material facts" are stated in this claim, viz., that the defendant wrote a letter charging the plaintiff with murder.

[LORD COLERIDGE, C.J. In a libel the words used are the "material facts," and the words used here may not have amounted to any such charge.

DENMAN, J. It would be very inconvenient if a plaintiff might allege that, according to his construction, a certain letter was a libel, without giving the Court an opportunity of judging whether it was so or not.]

That the letter in question charged murder is admitted by the demurrer.

Secondly. The claim alleges that the defendant maliciously put the law in motion against the plaintiff whereby he was pursued and damnified. This is a cause of action, although there was no malicious prosecution or malicious arrest because the plaintiff escaped.

LORD COLERIDGE, C.J. I am of opinion that this demurrer must be allowed. For the purposes of this decision I will assume that an improper thing has been done by the defendant of which the plaintiff complains, first, alleging a libel, and, secondly, malicious prosecution. With respect to the latter, his learned counsel admits that according to established rules the statemen of claim does not disclose a ground of action. No prosecution was instituted and determined. As to the libel the claim is in most general terms. It is conceded that this is an entirely new form of pleading, and that heretofore, both in slander and libel, it was usual to set out the words, according to a rule, not merely technical but founded on the substantial reason, stated by judges of authority to be that the defendant is entitled to know the precise charge against him and cannot shape his case until he knows. In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them. For a long time it has been held to be enough to prove the substance of the words alleged in the declaration, but if there was difference between both the form and substance of the words alleged, and of the words proved, the defendant was entitled to succeed. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used *those* defamatory expressions alleged, which is the fact on which the case depends.

I find it laid down in a book of the highest authority that, "it has long been settled that the declaration or indictment must profess to set out the very words published, and that it is not sufficient to describe them by their usual substance and effect": Starkie's Law of Slander and Libel, 2nd ed. vol. i. p. 362. That doctrine was so stated many years ago. It was lately reaffirmed by the decision of the Court of Appeal in language not less strong. Such, then, was the general law, and Mr. Petheram

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admits that before the Judicature Act his contention would not have been sustained; but he says that Order XIX., rule 4, enables him to claim, as he has done in this case. The rule declares that "every pleading shall contain, as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved. . . . ." I agree with him that we are bound by that rule, but for the reasons already given I think the words alleged to be libellous are the "material facts" in the present case. Moreover, the conclusion of the rule is: "Forms similar to those in Appendix C. hereto may be used." I turn then to the Appendix C. and find no form of claim in Libel or Slander. Therefore I think the Judicature Act leaves the law as it stood with respect to setting out the defamatory words in those actions; and that the claim is bad on demurrer.

DENMAN, J. I am entirely of the same opinion, and will only add that Order XIX., rule 24, cited by Mr. Petheram, seems not to aid his argument, for here the defamatory words are material, and the case comes therefore within the exception to the rule. According to all the decisions in ancient and modern times, the words are most material in actions for libel and slander.

Leave to amend within a fortnight on payment of costs, or judgment for the defendant.

Solicitors for plaintiff: *Whitaker & Woolbert.*
Solicitors for defendant: *Torr, Janeways, Torr, & Gribble.*

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March 7.

DOLPHIN *v.* LAYTON.

County Court—Garnishment—Attachment of Money in the Hands of the Court.

4 ChD 639
640
9 ChD 571
— 573

The proceeds of a judgment paid into the county court are not attachable by means of a garnishee summons at the suit of a third person as "a debt," due from the registrar of the court to the judgment-debtor.

Appeal from the County Court of Worcestershire holden at Bromsgrove.

1. At a court holden at Bromsgrove on the 9th of January, 1878, Mark Layton recovered against James Chapman a judgment for debt and costs amounting to 11*l.* 3*s.* At the same court George Dolphin recovered a judgment against the same Mark Layton for 16*l.* 14*s.* 6*d.* debt, and 5*l.* 3*s.* 7*d.* costs.

2. On the 22nd of January, 1878, and before the issuing of the garnishee summons next hereinafter mentioned, Chapman paid the the sum of 11*l.* 3*s.* into court into the hands of the registrar, in satisfaction of the judgment against him.

3. On the 22nd of February, 1878, Dolphin sued out a garnishee summons against Thomas Scott, the registrar of the court, to recover the 11*l.* 3*s.* paid into his hands by Chapman in satisfaction of Layton's judgment, claiming that sum as money received by Scott to the use of Layton, or as money holden by Scott as trustee for Layton absolutely.

4. Scott, the registrar, appeared and submitted to the judgment of the Court; but Mr. Simmons, who had been Layton's solicitor in the proceedings against him, intervened, and claimed the fund in court as assignee of Layton.

5. Simmons, the intervener, made two points,—first, he relied upon his title under the assignment, which, he contended, being prior in date to the garnishee summons against Scott, overrode the title of Dolphin thereunder,—and, secondly, he argued that the proceedings were misconceived, and that a garnishee summons did not lie against Scott, the registrar, who could not be said to be Layton's debtor by reason of the payment of the money into court to Layton's credit.

6. The judge of the county court decided that the alleged

assignment to Simmons was void within the statute of Elizabeth (13, c. 5); and no question is to be raised upon that part of his decision.

7. He further decided that, assuming Simmons to have under the circumstances a locus standi to dispute the liability of the registrar to proceedings by garnishee summons, such a summons *did* lie against him, as being quoad hoc the banker of Layton (1):

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(1) The judgment of the county court judge was as follows:—

This was a garnishee summons adjourned from the last court, claiming against Mr. Scott, the registrar of the court, a sum of 11*l*. 3*s*. paid into court by one James Chapman in an action at the suit of one Layton, in which judgment was recovered on the 9th of January last. At the same court Dolphin, the plaintiff in these proceedings, recovered a judgment against Layton for 16*l*. 14*s*. 6*d*. and 5*l*. 3*s*. 7*d*. costs, and he now seeks to have the funds in the hands of Mr. Scott applied in part satisfaction of this judgment. Mr. Scott shews no cause against the summons, and submits to the order of the court; but the summons was opposed by Mr. Simmons, the debtor Layton's solicitor, who claims under an assignment of Layton's judgment-debt alleged to have been made to him last court day. In support of his claim he raised two points,—first, that the proceedings were misconceived, and that no proceedings by way of attachment of the debt lay against Mr. Scott as registrar,—and, secondly, that, if Mr. Scott was liable to proceedings by attachment, his own title as assignee, which accrued prior to the issue of the present summons, overrode that of the judgment-creditor, Dolphin.

The first of these two points is one of very general importance; and, although it may be questionable whether it lies in Mr. Simmons's mouth to raise it, I have preferred to consider and decide it, in order to settle,—at least within the ambit of my own circuit,—a point on which, I believe, differences of opinion have prevailed, and on which, so far as I am aware, I can derive no assistance from authority.

It is objected that the registrar would only be liable to proceedings by garnishee summons if he were liable at law to the judgment-creditor in an action for money had and received, and that he is not so liable, being a trustee only, or, at most, a mere holder of the money as officer of the court. I do not stop to consider how far the first of these objections is affected by the fusion of law and equity effected by the Judicature Acts, and how far an equitable debtor may be rendered liable to a judgment-creditor of his equitable creditor for the balance which on taking a proper account might appear to be in his hands; because I am of opinion that previously to the Judicature Act the registrar would have been liable at the suit of the judgment-creditor (?) to an action for money had and received. The money in his hands ex equo et bono belongs to somebody, not himself. To whom, then, does it belong? Not to the execution-debtor, surely, who has divested himself of all title to it by paying it into court, not to be holden on his behalf, but in satisfaction of the judgment. Then, does it belong to the execution-creditor? It is said that it does not, because there has been no assent by the registrar to hold on his

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but upon this point (which is one of general importance) he gave leave to appeal.

The question for the opinion of the Court was,—1. Whether a proceeding by way of garnishee summons could under the circumstances above stated be maintained by Dolphin against Scott.

March 7. *Cyril Dodd*, for the appellant. To warrant a proceeding of this sort, there must be a *debt* due from the garnishee to the debtor, in respect of which the latter might have maintained an action against the former: see 17 & 18 Vict. c. 125, s. 61, which with the other provisions of the Common Law Procedure Acts relating to garnishment is incorporated into the county court jurisdiction by Orders in Council (1); and see the County Court Orders of 1875, Order XXIV, rule 3, which shews clearly that there can be no garnishment in the county court except in respect of a *debt* for which the judgment-debtor might have sued out a plaint in that court. (2) This is in fact an attempt to attach money in the hands of the court, for which there is no warrant. [He was stopped.]

The plaintiff and the garnishee were not represented.

LORD COLERIDGE, C.J. I am clearly of opinion that money in the hands of the registrar as an officer of the county court is not

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behalf. But I do not agree with this view. By accepting it as paid in absolutely in satisfaction of the debt, with notice of the purpose for which it is intended, viz. for payment to the judgment-creditor, the registrar assents to hold it to his credit, and as his banker; and the case is like that of an ordinary banker receiving money to the credit of a customer from a stranger, in which case there is no doubt that the customer could and that the stranger could not sue the banker for improperly detaining the money, in an action for money had and received.

These observations do not, of course, apply to the case where a debtor, disputing the validity of a judgment, pays the debt and costs into court with notice to the registrar not to part with them without the order of the court. By this notice the debtor shews that he retains an interest in the fund, and rebuts the inference which arises from an unconditional payment in satisfaction of the judgment-debt. In such a case, if an action were expressly brought against him for money had and received, the Court has the remedy in its own hands by staying the proceedings. So far, therefore, as regards the character in which the registrar holds the money, I see no objection to these proceedings.

(1) Poll. C. C. Pr. 8th ed. 211, n.

(2) See the form of plaint-note, No. 100 of the Schedule of Forms.

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subject to process of attachment. The appeal must be allowed, with the usual consequences.

DENMAN, J. I am of the same opinion. I see no distinction in this respect between the registrar of a county court and the masters of one of the superior Courts.

Appeal allowed, with costs.

Solicitors for appellant: *Pitman & Lane, for W. E. Simmons, Birmingham.*

TENNANT *v.* RAWLINGS.

March 7.

8 QBD 10

County Court Appeal—Time for moving for Order nisi—38 & 39 *Vict. c.* 50, *s.* 6—*Judicature Rules, Order LVII, rule* 6.

No leave of the Court or of a judge will avail to extend the time for moving by way of appeal against a decision of a county court, beyond the eight days limited by s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50)—Order LVII, rule 6, of the Rules of Court under the Judicature Act, 1875, applying only to the superior Courts.

Not followed Thame v. [illegible] Highway Bd 4 QBD [illegible]

THIS cause was tried in the Bloomsbury county court on the 29th of November last, when a verdict was found for the plaintiff.

On the 18th of December, *M'Call,* for the defendant, obtained an order nisi for a new trial, upon the ground, amongst others, of misdirection.

March 5, 1879. *E. Morten,* for the plaintiff, objected that the application was out of time, and therefore could not be entertained; s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50), requiring the motion to be made, "within eight days after the decision shall have been made or given," to the Court to which the appeal lies, or, if the Court to which such appeal lies be not then sitting, "before any judge of a superior Court sitting in chambers."

M'Call, to excuse the delay, produced an affidavit of a clerk to the defendant's solicitors, sworn on the 7th instant, to the following effect:—The Divisional Court was not moved for a rule nisi before the 18th of December, 1878, for the following reasons,—At

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the trial on the 29th of November, the judge, on the application of the defendant, stayed execution for *ten* days, to enable the defendant to move for a rule in the Common Pleas Division. On the 6th of December, and after the brief to move was delivered to Mr. M'Call [who was then in Court ready to move], Denman, J., announced that he had received a communication from Lord Coleridge at Guildhall stating that the business there was very heavy, and required all the assistance that could be given; that the Court of Queen's Bench had notified that they could spare no judges at present for Guildhall, and that it was therefore arranged, as the business in banco for this Division was almost disposed of, that two Common Pleas judges should sit all the then next week in the Queen's Bench Courts at Guildhall, and two other judges of this Division in the Common Pleas Courts there, and that Grove, J., the only remaining judge, would sit at nisi prius at Westminster; that Denman, J., in reply to Mr. Waddy, Q.C., added that it might be understood that *extension of time would be granted in all cases of application to the Court for new trials*, &c., for that it would only incumber the Queen's Bench Division, and not relieve it, if such motions were sent there to be disposed of; and that, there being no Court sitting for the purpose of taking such motions, Mr. M'Call, on the 11th of December, 1878, applied to Lindley, J., sitting at nisi prius, to extend the time, and meanwhile to stay execution, when that learned judge made an order in these terms.—"Upon hearing counsel for the defendant, I do order that the time be extended and execution stayed till the Common Pleas Division takes motions on appeal from inferior Courts."

Morten. No leave of a judge, or even of the Court, can contravene the express words of the statute. This is distinctly laid down by the Court of Appeal in *Brown* v. *Shaw* (1), where Bramwell, L.J., says: "The power [to enlarge the time for doing an act] is not extended to proceedings under the County Courts Act, 1875, s. 6; and the orders and rules of the Supreme Court of Judicature Act, 1875, do not apply to the present case."

M'Call. The Courts have constantly extended the time in these cases, where the party wishing to appeal has through no laches on

(1) 1 Ex. D. 425.

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his part been prevented from moving within the time limited by the statute. In *Morgan* v. *Davies* (1), there were four or five applications for extension of time, in consequence of the inability of the plaintiffs to obtain a copy of the judge's notes, as required by the Order of January 22nd, 1877; and ultimately the rule was granted more than two months after the day of hearing.

LORD COLERIDGE, C.J. Whatever may have inadvertently been done in other cases, the case of *Brown* v. *Shaw* (2) is to the effect that we have not the power to extend the time for moving in matters of appeal from the county court. Indeed, it is difficult to see how, when the plain words of the statute are looked at, the Court of Appeal could have formed any other opinion. The 38 & 39 Vict. c. 50, s. 6, in terms says that the motion shall be made "within eight days from the time the decision of the county court was pronounced." If the Divisional Court was not sitting, the application might have been made to a judge at chambers. This order must be discharged; but, under the circumstances, we think it should be without costs.

DENMAN, J., concurred.

Rule discharged.

Solicitor for plaintiff: *W. Belemore.*
Solicitors for defendant: *Drake, Son, & Parton.*

(1) 3 C. P. D. 260.

(2) 1 Ex. D. 425.

1879
March 7.

FEARNLEY, Appellant; ORMSBY, Respondent.

Surveyor of Highways—"Wilful" Obstruction of Highway—Highway Act, 5 & 6 Wm. 4, c. 50, s. 72.

12 QBD 122 : 3
125

A local surveyor of highways, in repairing a road, placed stones thereon, and allowed them to remain at night insufficiently fenced and without sufficient light to warn the public against the obstruction:—

Held, that he was properly convicted under s. 72 of the Highway Act, 5 & 6 Wm. 4, c. 50, notwithstanding that he might also have been guilty of an offence under s. 56.

Case stated by justices under 20 & 21 Vict. c. 43.

The appellant was convicted in a penalty of 10*s.* for having on the 3rd of August, 1878, unlawfully obstructed the free passage of a certain highway in the parish of Ovenden in the west riding of the county of York, when the following case was stated for the opinion of a Divisional Court:—

1. The appellant was and is the working surveyor of the Ovenden Local Board, within whose district the highway referred to in the information, and which is called Netherton Lane, is situate.

2. Prior to and on the 3rd of August, 1878, the defendant was engaged in repairing Netherton Lane for about 100 yards of the length thereof; and on the 2nd and 3rd of August with that object he had caused the surface of the lane for its entire width, with a length of about five yards, to be broken up, and a number of large stones which had previously formed part of the "sett stones" of the road to be placed on the portion of the lane under repair, for use in such repair, which stones remained there on the day and night of the 3rd of August.

3. The appellant had caused boards to be erected at each end of the portion of the highway under repair, and notices to be affixed thereon, stating that the road was closed for repairs; and in the night a lamp was placed at each end of the said portion of the highway; but these lamps were not sufficiently attended to on the 2nd and 3rd days of August; and on the night of the 3rd the light at one end of the highway under repair was quite out, and at the end thereof the light was insufficient for the purpose

of warning the public that the road was stopped. It was proved that previous to the 2nd and 3rd of August, and also on the 3rd of August, the attention of the appellant had been called to the insufficiency of the light.

4. The solicitor for the appellant contended that the obstruction of the highway was consequent on doing the work then in hand, and necessary while the highway was under repair, and that it was not a *wilful* obstruction within the meaning of 5 & 6 Wm. 4, c. 50, s. 72, under which the information was laid.

5. The justices were of opinion that, inasmuch as there was no sufficient light to warn passengers with horses, carts, and carriages, from proceeding on the highway so under repair, and as the boards erected at each end thereof did not extend over the entire width of the lane, and it was quite possible for such passengers to pass them and proceed along the road up to the place where the stones were laid, without being aware that the road was stopped, the stones so placed thereon would necessarily cause an obstruction preventing safe passage over the same; and they therefore determined that, although the highway was then under repair, the leaving of the stones thereon under the circumstances and in manner aforesaid was wilfully done, and that the appellant did therefore wilfully obstruct the passage of the said highway.

The question for the opinion of the Court was, whether the determination was or was not erroneous in point of law.

Anstie, for the appellant. The thing charged was not a *wilful* obstruction within s. 72 of the Highway Act, 5 & 6 Wm. 4, c. 50, which imposes a penalty of 40*s.* upon any person who shall, amongst other things, "wilfully obstruct the free passage of any highway;" nor does it become so because it may have been done negligently. The magistrates, having the surveyor before them under that section, which relates entirely to obstructions of the highway, have convicted him under s. 56, which provides that, "if any surveyor or district surveyor shall lay or cause to be laid any heap of stone or any other matter or thing whatsoever upon any highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the said surveyor to guard against the same, he shall forfeit a sum not exceeding 5*l.*"

[LORD COLERIDGE, C.J. Why may he not offend against both sections? If he lays down stones in the highway instead of at the side, and leaves them there at night without any sufficient warning to passers-by, is not that negligence within s. 72?]

Cave, Q.C., contrà, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that the conviction in this case was correct. The facts stated disclose a wilful obstruction of the highway within the fair meaning of the Act. It was a wilful obstruction, in the sense of being purposely placed there by daylight; but no one complains of that. But the obstruction becomes dangerous by leaving it there at night insufficiently fenced and lighted. That being so, the defendant was guilty of an offence under s. 72; and he is not the less liable to the penalty imposed by that section, because, being surveyor, he was guilty of negligence for which he might also have incurred a liability under s. 56.

DENMAN, J. The obstruction complained of is admitted to have been wilful in the sense of an act done purposely. The appellant had no right to do it, unless he did it in a reasonable manner. And, the magistrates having found that the obstruction was left unfenced and unlighted during the night after complaint made to him, I think he was properly convicted under s. 72 of the Act.

Appeal dismissed.

Solicitors for appellant: *Layton & James, for Holroyde & Smith, Halifax.*

Solicitor for respondent: *G. Badham, for Marsden, Williams, & Co., Wakefield.*

E. PELLAS & CO. *v.* THE NEPTUNE MARINE INSURANCE COMPANY.

1879
March 18.

Marine Policy—Right of Set-off by Insurers—31 & 32 *Vict. c.* 86, *s.* 1.

In an action by the assignee of a policy of insurance, the insurers are entitled, by virtue of 31 & 32 Vict. c. 86, s. 1, to set-off a debt incurred with them by the assured for premiums on policies effected with them by the assured prior to the date of the assignment.

Revd on appl 5 C.P.D. 34. C.A.

THE plaintiffs are merchants in London. The defendants are an insurance company carrying on business at West Hartlepool, in the county of Durham.

On the 7th of April, 1876, Anthony Harris & Co., of Newcastle, effected a policy of insurance (in the usual form) for 300*l.* on a cargo of coals (and cash advances) shipped on board the ship *Toivatar*, for a voyage from the Tyne to Genoa. The defendants became insurers to Harris & Co. for 300*l.* Harris & Co. were at the time of the making of the policy, and thence up to the date of the agreement hereinafter mentioned, interested in the coals and cash to the amount of all the moneys by them insured thereon, and the policy was made on their account and for their use and benefit.

On the 22nd of May, 1876, the policy was assigned by Harris & Co. to M. L. Questa, of Genoa; on the 30th of the same month it was assigned by Questa to Pastorini & Co., of Genoa; and on the 10th of May, 1877, it was assigned by Pastorini & Co. to the plaintiffs,—by virtue of which assignments all the right, title, and interest in the policy passed to the plaintiffs.

The coals were duly shipped on board the *Toivatar* in the Tyne, to be carried to Genoa; and whilst on her voyage, by perils of the sea the goods were lost, and the defendants settled and agreed the loss as a total loss. Against the claim of 300*l.* the defendants, by way of set-off pleaded that "at and previous to the date of the writ (August 24th, 1877) and at the time when the loss in the statement of claim mentioned arose, Harris & Co. were and they still are indebted to the defendants in the amount of 40*l.* 0*s.* 4*d.* in respect of moneys due by Harris & Co. to the defendants for premiums on policies other than the policy in the statement of claim mentioned, effected by Harris & Co. with the defendants," and the defendants claimed to set off that sum against an equal amount of the plaintiffs' claim, paying the balance into Court.

At the trial before Lord Coleridge, C.J., at the last sittings in London, the plaintiffs relied upon s. 1 of 31 & 32 Vict. c. 86, which enacts that "whenever a policy of insurance on any ship (1), or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name, and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected," and contended that the words "any defence" were confined to a defence arising on the policy itself, and did not include a set-off or any defence arising dehors the policy. On the other hand, it was contended that the object of the enactment was, as its title expresses, to enable the assignee to sue on the policy in his own name, instead as theretofore in the name of the assignor, but not to alter the law in any other respect.

The Lord Chief Justice directed a verdict for the defendants.

Nov. 4, 1878. *Murphy, Q.C.*, obtained a rule for a new trial, on the ground of misdirection.

Dec. 4. *Herschell, Q.C.*, and *A. L. Smith*, shewed cause. There is no reason why the plain words of the statute should be limited in the way suggested. If Harris & Co. had sued, this defence would clearly have been open to the defendants. There is no hardship; for the assignees of the policy might have given notice of the assignment.

Murphy, Q.C., and *Webster, Q.C.*, in support of the rule. The contention of the defendants will entirely frustrate the object the legislature had in view, which was, to facilitate the remedies of the assignee of a policy, and to prevent the assignor from defeating the assignment by getting credit upon the policy, as he has done here. Contracts are daily made for the purchase of cargoes

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(1) This provision was enacted as to life-policies by 30 & 31 Vict. c. 144.

"to arrive," the value of which materially depends upon whether they are insured or not. It was with a knowledge of the existence of this practice that the Act in question was passed. Unless the defence be limited to those which arise on the policy itself, the relief which the legislature intended to afford to assignees will wholly fail.

[They further contended that the claim here, being for unliquidated damages, could not be the subject of a set-off,—citing *Cumming* v. *Forester* (1), *Luckie* v. *Bushby* (2), *King* v. *Walker* (3), and 1 Arnould on Insurance, 5th ed. 219. This point, however, was not taken at the trial. (4)]

Cur. adv. vult.

March 18. The judgment of the Court (Denman and Lopes, JJ.) was delivered by

LOPES, J. The plaintiffs are merchants, the defendants underwriters. The action is brought on a policy of insurance for 300*l.* effected in January, 1876, by Harris & Co., a firm at Newcastle, on a cargo of coals, and cash advances, shipped on board the *Toivatar* for a voyage from the Tyne to Genoa. The defendants, in consideration of the premium, underwrote the policy and became insurers to Harris & Co.

On the 22nd of May, 1876, the policy was assigned by Harris & Co. to one Questa, of Genoa, and on the 30th of May, 1876, the policy was further assigned by Questa to Pastorini & Co., of Genoa, who on the 10th of May, 1877, assigned to the plaintiffs. The *Toivatar* with the coals and cash advances was by the perils insured against totally lost.

The defendants admitted that the plaintiffs were entitled to recover, and paid the 300*l.* into Court, except the sum of 40*l.*, which the defendants contended they were entitled to set-off,—the 40*l.* being a debt due to the defendants from Harris & Co., incurred in 1876.

The cause was tried before the Chief Justice of the Common Pleas, in London, who directed a verdict for the defendants. A rule was subsequently obtained for a new trial, for misdirection, the ground being that the learned judge ought to have told the jury that the defendants could not set off this 40*l.* against the present plaintiffs.

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(1) 1 M. & S. 494.

(2) 13 C. B. 864.

(3) 3 H. & C. 209.

(4) See Order xix, r. 3.

The question we have to consider on the argument of this rule is, whether, having regard to the provisions of the Act 31 & 32 Vict. c. 86, this set-off can be pleaded as a defence against the plaintiffs, who are assignees of the policy. The Act is intituled "An Act to enable assignees of marine policies to sue thereon in their own names." Sect. 1 is as follows:—"Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected."

It is contended on the part of the plaintiffs that "any defence" is confined to a defence arising on the policy itself, and cannot cover or include a defence like a set-off, or in fact any defence which does not arise upon the policy. We are unable to place this limited meaning on the word "defence" used as it is in this Act of Parliament. It would be doing violence to the plain language. Previously to the passing of the Act, an assignee of a marine policy could not sue in his own name: he must have sued in the name of his assignor. The Act was passed to remedy this evil; and, according to our view, the legislature intended to leave the law in all other respects as it was. It was intended to enable the assignee to sue in his own name; but the defendant was to be entitled to make any defence to the action of the assignee which he might have made to the action of the assignor. Before the Act, if this action had been brought, as it must have been, in the name of Harris & Co., the defendants could have set off this 40*l.* If the debt set off had accrued since the assignment, and the defendants had notice of the assignment, it might have been replied as an equitable replication; but the 40*l.* beyond all question could have been set off.

We think the defendants are entitled to set off the 40*l.*

A point was taken by the plaintiffs on the argument, which was not raised at the trial. It was, that the plaintiffs' claim was for unliquidated damages, and that the 40*l.* could not be set off against such a claim.

We do not think it necessary to consider this. The point ought to have been taken at the trial. If it had been, the learned judge would probably have amended the statement of defence, by permitting the defendants to add a counter-claim for this 40*l.* If it had been pleaded as a counter-claim, we think it would have come within the words "any defence" in the Act. Had the Act not been passed, the defendants could only have sued in Harris & Co.'s name. If Harris & Co. had been plaintiffs, the defendants could under the Judicature Acts have made this 40*l.* the subject of a counter-claim and defence; and we think that it would have been within the meaning of the Act of Parliament.

Rule discharged.

Solicitors for plaintiffs: *Lowless, Nelson, Jones, & Thomas.*

Solicitors for defendants: *Shum, Crossman, Crossman, & Pritchard, for Turnbull & Tilly, West Hartlepool.*

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FINCH *v.* BONING.

Feb. 28.

Tender—Clerk in Solicitor's Office—Refusal to receive—Implied Authority to receive—Composition on Law Costs.

Money payable as a composition on a sum due to a solicitor for costs was tendered to a clerk in his office, who, saying that the solicitor was out, and that he, the clerk, had "no instructions," refused the money:—

Held, per Lord Coleridge, C.J., that the clerk's statement did not amount to a disclaimer of his authority to receive the money; as he was apparently conducting his master's business in the office, such authority might be implied; and, therefore, the tender was good:

Per Denman, J., that the statement was, in effect, a disclaimer of authority; the case was, therefore, indistinguishable from *Bingham* v. *Allport* (1 Nev. & M. 398) and the tender was bad.

CASE stated for appeal by the judge of the Southwark County Court.

1. This was an action brought by the plaintiff, a solicitor, to recover 15*l.* 6*s.* 10*d.*, the amount of a bill of costs.

2. The defence was a discharge by a resolution of the defendant's creditors, under s. 125 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and a tender of the amount of the composition on the said debt before action brought, but that the plaintiff had refused to accept the same. The defendant paid into court the amount of the composition.

3. In support of the above defence a witness was called, who stated that he was the accountant engaged by the defendant in the proceedings for liquidation by composition, and that he and the defendant's solicitor (since deceased) went to the offices of the plaintiff, and there tendered the amount of the composition to one of the plaintiff's clerks, who informed him that the plaintiff was out, and that he (the clerk) had received no instructions, and refused to accept the amount tendered.

4. On the part of the plaintiff it was denied that any such tender was ever made at all, and witnesses, consisting of the clerks then in the plaintiff's service, were called in support of such denial.

The judge, however, was of opinion that the matters stated in the 3rd paragraph were proved, and gave judgment for the defendant with costs.

The question for the opinion of the Court was whether the said judgment for the defendant was right, or whether the same should be reversed and entered for the plaintiff, with costs of suit.

Poulter, for the plaintiff. The tender was bad. The case is governed by *Bingham* v. *Allport* (1), where a tender made at an attorney's office to his clerk, who said that he had no authority from his principal to receive the money or to give a discharge for the debt owing, was held insufficient. In *Wilmott* v. *Smith* (2), which may be cited for the defendant, the clerk refused the money because it was not enough. He did not disclaim his authority to receive it. So in *Barrett* v. *Deere* (3), where a payment made to a person sitting inside a counting-house with account books near him, and who gave a receipt for the principal, was held good. That, however, was a merchant's office.

(1) 1 Nev. & M. 398.
(2) 1 M. & M. 238.
(3) 1 M. & M. 200.

[LORD COLERIDGE, C.J. The decision is not put on that ground, but on the serious consequences of invalidating payments made in a large place of business to a person apparently entrusted with the conduct of it. In *Moffat* v. *Parsons* (1) an argument that tender to a clerk, unless he has express authority, would not be good was met by Mansfield, C.J., saying, "A tender to a managing clerk would suffice."

DENMAN, J. This tender was at the office where it ought to have been made: *Kirton* v. *Braithwaite.* (2) The judge seems to have found the tender as a fact.]

The tender to the clerk only.

[LORD COLERIDGE, C.J. There is an *Anonymous Case* (3), where money was delivered to a servant, who took it, as was supposed, to her master, and returned, saying he would not receive it; Lord Kenyon, J., "said that in the common transactions of life this kind of intercourse by the intervention of servants must be allowed;" and that there was evidence from which the jury might infer a tender. Is there not evidence of it here?]

No; for the clerk had no instructions. In *Watson* v. *Hetherington* (4) an attorney wrote asking that money should be paid to him; and tender to a writing clerk at his office, who would not, and said he could not, receive it, his master being out, was held bad. Here there was an implied request that the money should be paid to the attorney himself. Surely it cannot be said that tender to any office boy would be valid.

Melsheimer, for the defendant. This tender was good. It was made at the proper place to a person who, according to *Barrett* v. *Deere* (5), had implied authority to receive the money. He did not disclaim that authority, but merely stated that he had "no instructions" about the particular matter. The person who goes to an office to make a tender cannot ascertain the precise functions and the extent of the authority of those he finds conducting the business, and therefore is entitled to rely on the presumption which may be fairly drawn as to their powers to transact business affairs.

(1) 5 Taunt. 307.

(2) 1 M. & W. 310.

(3) 1 Esp. 349, 350.

(4) 1 C. & K. 36.

(5) 1 M. & M. 200.

LORD COLERIDGE, C.J. I regret that the Court is not agreed on this question. I am of opinion that the judgment below was right, and ought to be affirmed. The tender appears to me to have been perfectly good according to the decided cases. I apprehend that the principle is this, viz., that the tender need not be to the principal himself, if the individual to whom the tender is actually made be one who is either, by the course of practice or by direct authority from his principal, authorized to receive the money tendered, or one whom the person who makes the tender has good reason—given by the principal himself—to believe has authority to receive it. Such is the true principle, and the moment the absolute necessity for tender to the individual himself is dispensed with, reasonable evidence that some one who represents him is put in his place may be received. Now, who in an attorney's office does represent him? In *Watson* v. *Hetherington* (1) Parke, B., said that if an attorney asks payment at his office, a tender to any person who is in the office carrying on the business will do, and decided against the tender to an ordinary clerk in an office solely on the ground that the attorney had insisted that the tender should be made to himself. There the defendant's agent went to the office and made a tender, and was told that the attorney was out, yet presented it to a person who he knew was not authorized to receive it. So in *Moffat* v. *Parsons* (2) and *Bingham* v. *Allport* (3) the principle is that when there is a place of business, and a person is conducting that business, a tender made there to that person is as good as if made to the principal himself. There is, no doubt, the qualification, that if at the time of the tender the person to whom it is made distinctly disclaims authority to receive it, the tender is made at the peril of him who makes it, because, should it turn out that the person to whom it was made had no authority to receive the money, the tender will be bad. That is the case of *Bingham* v. *Allport* (3), where the man to whom the tender was made did not say he knew nothing about it, or that he was not the clerk, and the master had spoken to him about it, but said he had no authority from his principal to receive the money. Three judges held the tender bad, and whatever I might think of the decision, of which, however, I quite approve, I should be bound by it. But the present case must be taken strictly, because the county court judge finds in favour of the tender on the facts and disbelieves the evidence given against it, and therefore it is to be supported if it can be. He finds that the clerk said he had "no instructions," as I understand, in the particular affair. If this tender be not sufficient, no tender could be made in any great merchant's or solicitor's office in the city of London. For a debtor goes with his money and tenders it to the person carrying on the business, and in ninety-nine cases out of a hundred that person will say that he knows nothing about the matter, and has no instructions. If his statement would invalidate the tender, a good tender could never be made under like circumstances.

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(1) 1 C. & K. 36.

(2) 5 Taunt. 307.

(3) 1 Nev. & M. 398.

Such, however, is not the law nor the principle, and, therefore, although the decision in *Bingham* v. *Allport* (1) might seem to conclude this case, yet when attentively examined it will be found not to do so, and the finding here that the clerk said he had "no instructions" will not suffice. He must have no authority, and the statement that he had no instructions was perfectly compatible with his having authority. I must take it that the county court judge found that the clerk had authority, for he found that there was a good tender. I think the judgment was right.]

DENMAN, J. I am by no means satisfied that my opinion is correct, but I am unable to distinguish the case of *Bingham* v. *Allport* (1) from that before us. The doctrine seems to be that a tender, to be good, must be made to the principal, or to a person having authority to receive the money, and the principle of *Bingham* v. *Allport* (1) is that the clerk, who might primâ facie appear qualified to receive the money, and one to whom a tender might be made, by simply saying that he had no authority, rebutted the presumption that he was authorized. He said he had no authority from his principal to receive the money, and the judge told the jury that if they thought the clerk had disclaimed all authority to receive the money the tender would be insufficient. Here, the clerk said that his master was out, and that he had no instructions. It seems to me to have the same effect as the words "he had no

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(1) 1 Nev. & M. 398.

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authority" in *Bingham* v. *Allport.* (1) But I am not sorry that my Lord Chief Justice has been able to distinguish that case so as to do justice in this. It is not one where leave should be given to appeal.

Judgment for the defendant.

Solicitor for plaintiff: *Finch.*
Solicitors for defendant: *Hoppe & Boyle.*

March 6, 7.

STEVENSON *v.* WATSON.

Arbitrator, Position of—Architect—Action against, by Builder for improper Measurement and Estimation of Work—Certificate—Reconsideration of.

Claim, that the plaintiff contracted with a company to build a hall, the plans, bill of "quantities," &c., for which had been prepared by the defendant who was employed by the company, and named in the contract as their architect to carry out the works. The contract provided that the architect might order additions to or deductions from it, and that the amount of them should be ascertained by the architect in the same manner as the "quantities" had been measured, and at the same rate as they had been priced at; that the contractor and the company would be bound to leave all questions or matters of dispute which might arise during the progress of the works, or in the settlement of the account, to the architect, whose decision should be final and binding upon all parties, and that the contractor would be paid on the certificate of the architect. The claim then alleged that the contract was signed by the plaintiff in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff; that the work was done; that additions and deductions were ordered, and certificates given by the defendant, but that he did not use due care and skill in ascertaining the amounts, and neglected and refused to ascertain them in the same manner as the "quantities" had been measured, and at the same rate, and knowingly or negligently certified for a much less sum than was the net balance payable to the plaintiff, and refused to reconsider his final certificate, by reason whereof the plaintiff was unable to obtain payment from the company of the balance.

On demurrer:—

Held, that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie.

CLAIM: that the plaintiff was a builder in partnership with Field Weston. The defendant was an architect.

(1) 1 Nev. & M. 398.

A certain company proposed to build a hall, and employed the defendant as architect to prepare, and he accordingly prepared, plans, drawings, specifications, general conditions of contract, and a bill of the quantities of the works. Thereupon the defendant was employed by the company as architect to carry out the works, and to be the architect under the contract proposed to be entered into by the company with the contractors for the works.

The company advertised for tenders, and directed applications with reference thereto to be made to the defendant, and, after examining the plans, drawings, and specifications, and bills of quantities of the proposed works at the office of the defendant, the plaintiff and one Field Weston tendered for the execution of the works, and their tender was accepted by the company. The defendant requested the plaintiff and Weston to come to his office to execute the contract; and accordingly the plaintiff and Weston signed the contract for the works at the office of the defendant, who witnessed their signature. The contract was made between the plaintiff and Weston of the one part, and the company of the other part, and was as follows:

"The said Richard Stevenson and Field Weston agree to erect and build for the said company . . . the hall according to the drawings, general conditions of contract, and bills of quantities now produced and signed by the parties hereto, and intended to form parts of this agreement, and shall and will finish and complete the hall in such manner, and of such materials, and within such time as is provided by the said general conditions of contract and bills of quantities, and according to the said drawings; and further, that they the said Richard Stevenson and Field Weston will well and truly observe and perform all and every the said conditions and stipulations contained in the said general conditions of contract on the part of the contractors required to be observed and performed, and, in consideration thereof, the said company to pay unto the said Richard Stevenson and Field Weston the sum of 13,560*l.* in the manner set forth in the said general conditions of contract, and in other respects to perform and keep the conditions and stipulations of the said general conditions of contract, so far as the same on their part is or ought to be performed and kept."

The general conditions of contract referred to in the contract, so far as they were material to this case, were as follows:—

"The general conditions of contract for artificers' works required to be done in the erection and completion of a new hall for the Nottingham Temperance Hall Company, Limited, Nottingham, Fothergill Watson, architect, Churton Street, Nottingham, January, 1874." "The architect is at all times to have access to the works, which are to be entirely under his control, and his clerk of the works. The architect may order any additions to or deductions from the contract without in any way vitiating the contract, and the amount of such additions to or deductions from the contract shall be ascertained by the architect in the same manner as the 'quantities' have been measured, and at the same rate as they have been priced at.

"The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decisions shall be final and binding upon all parties.

"The contractor will be paid on the certificate of the architect."

The said bill of quantities contained (amongst others) the following stipulations:—

"Note.—These quantities will, with drawings and general conditions, form the basis of the contract.

"Should there be more or less measure than is here given, there will respectively be an addition to or a deduction from the contract.

"All measurements to be made in the same manner as the quantities have been taken, and all additions and deductions to be priced out at the same rate by the architect."

The contract was signed by the plaintiff and Weston in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff and Weston under the said contract. Thereupon the plaintiff and Weston proceeded with the execution of the works, and the defendant acted as the architect of the works, and undertook the duties of the architect under the contract.

The defendant from time to time during the progress of the works ordered additions to and deductions from the contract.

There were errors in the bill of quantities, and there was, in fact, more measure in certain descriptions of the work than was given in the bill of quantities.

The defendant from time to time during the progress of the works by his certificates certified that certain sums of money were payable to the plaintiff and Weston in respect of the works executed by them, and gave the same to them, and the said sums, amounting to 10,000*l.*, were paid by the company upon the said certificates.

The plaintiff, after the completion of the works, sent to the defendant accounts in respect of the works executed, shewing, as the fact was, that, after adding to the contract the amount of the additions ordered by the defendant, and deducting the amount of the deductions ordered by the defendant, and making the stipulated additions in respect of the said errors in the bill of quantities, and giving the company credit for the sum of 10,000*l.* paid by them as aforesaid, there remained a balance of 1616*l.* 6*s.* 7*d.* unpaid in respect of the works executed, and for which they were entitled to have the defendant's certificate.

The defendant, without calling upon the plaintiff or Weston for any explanation of the said accounts, and without any communication with them on the subject thereof, made and sent to the plaintiff and to the company his certificate, certifying that the net balance due to the plaintiff over and above the amounts which he had previously certified was 251*l.* 14*s.* 4*d.*

Par. 17. The defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff under the said contracts, but, in ascertaining the net balance due to the plaintiff, neglected and refused to ascertain, and did not ascertain, the amount of the said additions to and deductions from the contract in the same manner as the quantities had been measured, and at the same rate as they had been priced out, or that there was more measure in the said description of works than was given in the bill of quantities, by making measurements in the same manner as the quantities had been taken, and neglected and refused to price out, and did not price out, the excess at the same rate, and make the stipulated addition to the contract in respect thereof according to the terms of the contract, nor did he use due care and skill to ascertain in the manner provided by the contract what was in fact the net balance payable to the plaintiff by the company, in respect of the works executed for which the defendant was entitled to his certificate, but the defendant knowingly or negligently certified as aforesaid for a much less sum than was in fact the net balance payable to the plaintiff in respect of the works executed.

Par. 18. Upon the receipt of the said certificate, the plaintiff requested the defendant to inform him of the data upon which the same was based, but he refused to furnish the plaintiff with them, or to give him any information on the subject. The plaintiff thereupon requested the defendant to reconsider the said certificate, and offered to point out to him the said errors in the bill of quantities, and to give him any explanation he might require of the said accounts, but the defendant refused to reconsider the said certificate, and to allow the plaintiff to point out to him the said errors in the bill of quantities, or to explain the said accounts, or to hear any objection whatever on the part of the plaintiff to the said certificate.

By reason of the premises the plaintiff was unable to obtain payment from the company of the balance, and had been deprived of and had wholly lost the same and the use thereof from the time when he was entitled to the certificate of the defendant for the amount thereof.

After the making of the contract the plaintiff and Weston dissolved partnership, and the causes of action became and were vested in the plaintiff alone.

The plaintiff claimed damages 1364*l.* 12*s.* 3*d.* and interest.

DEFENCE. Demurrer on the ground that the statement of claim shewed that the defendant was in the position of an arbitrator, and that he acted, and declared his decision, and the claim did not allege fraud or mala fides, and, therefore, shewed no cause of action, and on other grounds sufficient to sustain the demurrer.

Wills, Q.C. (*Graham*, with him), for the defendant. The claim is bad. The action is brought against a person in the posi-

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tion of a quasi-arbitrator, and therefore will not lie: *Pappa* v. *Rose.* (1) There, the quality of raisins sold was left to the opinion of the selling broker. This Court and that of the Exchequer Chamber held that he was a sort of arbitrator, and, consequently, was not liable for failing to exercise reasonable care and skill in coming to a decision as to the quality of the fruit, he having acted bonâ fide and to the best of his judgment. So likewise an average adjuster, to whom the owners of a ship and the owners of its cargo referred a question as to the proportion of a loss to be borne by each, has been held to be in the nature of an arbitrator: *Tharsis Sulphur and Copper Company, Limited* v. *Loftus.* (2) An arbitrator is under no legal duty to use either care or skill.

[LORD COLERIDGE, C.J. The position of the architect is peculiar, and is different from that of an average stater or fruit broker. The architect has an interest in reducing the builder's bill.]

So had the engineer of the defendants' company in *Ranger* v. *Great Western Ry. Co.* (3), but the House of Lords held that the plaintiff contractor, who had bound himself to submit to the decision of the engineer, could not complain of his decision. In *Scott* v. *Corporation of Liverpool* (4), the contractor filed a bill against his employers and their engineer complaining of undue delay by the latter in awarding the amount earned by the contractor, and sought payment of what was due upon the contract, but did not establish any case of fraud or collusion against the engineer. The bill was dismissed with costs. It is against public policy to allow this action. There is no precedent for it. If it could be maintained attempts would be constantly made to disturb the decisions of those chosen by the parties to fix sums payable. The claim alleges a duty in the architect towards the builder which must be based on some implied contract. But there is none.

[DENMAN, J. There is a duty to be honest. Suppose clear proof were given of a conspiracy between the architect and his employer to defraud the builder?]

Fraud is not alleged in the present case.

[LORD COLERIDGE, C.J. What if the architect has not in a fair sense of the word decided at all?]

(1) Law Rep. 7 C. P. 32, 525.

(2) Law Rep. 8 C. P. 1.

(3) 5 H. L. C. 72.

(4) 3 De G. & J. 334.

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He has certified from time to time, and finally. The last certificate being given the architect was functus officio, and was therefore right to decline to give another.

Cave, Q.C., for the plaintiff. The architect was not an arbitrator or quasi-arbitrator; but if he was, then he has been guilty of misconduct, for which the action will lie.

First, his duty was simply that of "measuring up" the work, to ascertain the amount of the additions to or deductions from the contract. This duty was merely ministerial, and such as he might delegate. He, no doubt, did delegate it to a clerk. The plaintiff entered into the contract on the faith that the architect would act upon the terms of it, and measure up according to the prescribed mode. It was to the advantage of the architect that the builder should undertake to carry out his plans, and therefore there was consideration moving from the plaintiff to the defendant for an agreement by the defendant to measure up the work according to the terms of the contract. If asked whether he would undertake to use care and skill when measuring up, he would of course have answered in the affirmative. Whereas an arbitrator does not undertake to use either care or skill, but only to be impartial. Valuation is not arbitration. For instance, an appraisement of hay and repairs which is made for the outgoing or incoming tenants of a farm by valuers between them, need not be stamped as an award: *Leeds* v. *Burrows.* (1) The Courts have indeed somewhat extended the doctrine that protects arbitrators, to quasi-arbitrators, as in *Pappa* v. *Rose.* (2) There, however, the broker undertook to give his opinion upon the fruit submitted to him. Moreover, a dispute had arisen. But the function of a mere valuer is not judicial, nor does it become so because two parties employ the same person to value the subject-matter of a contract between them. The architect here was appointed and employed by both parties. Possibly if he had not acted at all, the plaintiff could not have sued him for refusing to do so; but having accepted and entered upon his duties he undertook to measure the work in the manner specified in the contract, and to bring care, skill, and professional knowledge to the performance of his duty: *Story* v. *Richardson* (1); *Jenkins* v. *Betham.* (2) He is liable for a breach of that undertaking.

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(1) 12 East, 1.

(2) Law Rep. 7 C. P. 32, 525.

Secondly, even assuming that he was a quasi-arbitrator, "he was bound to exercise his judgment impartially between the contracting parties." See per Blackburn, J., *Pappa* v. *Rose.* (3) It cannot be said that he might even be dishonest with impunity.

A building owner who colludes with the architect to deprive the builder of a certificate is liable to an action: *Batterbury* v. *Vyse.* (4) And in *Ludbrook* v. *Barrett* (5) Grove, J., held, on demurrer, that an action would lie by a builder against an architect who fraudulently, and in collusion with the builder's employer, refused to certify, if the architect had an interest in the building contract. Where there is such collusion, there is abundant authority to shew that the action can be maintained. See per Erle, C.J., *Clarke* v. *Watson.* (6) The claim alleges that the defendant "knowingly or negligently" certified for a much less sum than was in fact payable. If he "knowingly" did so it was a wilful act, whereby the plaintiff was injured. Moreover, a claim may now be made, as this is, in the alternative. So if the architect either wilfully or negligently mismeasured the work the action lies. The plaintiff would be left without remedy if he cannot sue the architect, for his certificate cannot be set aside and another valuer appointed, as this is not an arbitration within the terms of the Common Law Procedure Act (17 & 18 Vict. c. 125, s. 12): *Collins* v. *Collins.* (7) Romilly, M.R., said in that case, "An arbitration is a reference to the decision of one or more persons . . . of some matter or matters in difference between the parties." (8) A valuation precludes differences, it does not settle those which have arisen. No dispute has arisen here, no judgment nor opinion has been given.

It was misconduct to refuse to hear the plaintiff, and to reconsider the certificate. The defendant has, in effect, not adjudicated at all. Ex parte proceedings before an arbitrator invalidate his award.

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(1) 6 Bing. N. C. 123.
(2) 15 C. B. 168.
(3) Law Rep. 7 C. P. 528.
(4) 2 H. & C. 42; 32 L. J. (Ex.) 177, 9 Jur NS 764
(5) 36 L. T. (N.S.) 616.
(6) 34 L. J. (C.P.) 148, p. 150.
(7) 26 Beav. 306. 5 Jur NS 530
(8) 26 Beav. at p. 312, 5 Jur NS 531

Wills, Q.C., in reply. The builder contracts with his employer on the terms that he shall appoint his own architect to watch over his interests; and that the architect's decision shall be final. He has to decide what are extras, and "measuring up" requires the exercise of professional judgment. This appears from the contract and bill of quantities which may be referred to as part of the claim. His certificate is a condition precedent to the contractor's obtaining payment. The architect is employed and paid by the building owner only, and makes no contract either express or implied with the builder.

The plaintiff has neither alleged nor suggested fraud or collusion by the defendant, and it cannot be inferred from the use in the claim of the word "knowingly," which means that he knew what figures he put down and their result, and did not make his calculations by accident or mistake.

LORD COLERIDGE, C.J. This is, no doubt, in some sense an action of first impression. If the true view of the case were only as Mr. Cave suggests, viz., that the plaintiff had undertaken to perform certain work under a contract made with a third person, to which the defendant was in terms no party, but that he was aware of and had acted under the contract which had imposed on him the duty of doing certain work requiring no judgment, no opinion, and requiring only the exercise of what I may call ordinary arithmetical powers, and the performance of his duty under that contract was necessary to the plaintiff's right to recover, yet the defendant had refused that duty, then I think the action would lie. But I am not aware that this form of action has ever been maintained. It is certain that in none of the cases cited the supposed duty was of the kind I have described, or the breach of duty was of the sort I have intimated. So as far as I know the action would be a fresh action unconcluded by authority, and for the maintenance of which there would be, in my judgment, very good grounds both in sense and law. But I am of opinion that is not the case before us. This claim is for that which has been over and over again attempted without success. It is an action against a man for the negligent performance of a duty, in the doing of which the exercise of judgment or opinion is necessary.

Such being the true view of the claim, the cases on that point apply and bind us. Speaking for myself I entirely approve of them, and think them sound and right.

The action is by a contractor—not against his employer but—against the architect of the building owner and, if you please, the architect of the contractor himself, under a contract, the material parts of which are sufficiently set out in the claim. [His Lordship read them.] The work appears to have been done, and during the performance of it the defendant ordered additions to and deductions from the contract. The plaintiff states there were errors in the bill of quantities, and that there was more "measure" in certain descriptions of work than given in the bill of quantities. That means, I suppose, that under the bill of quantities he had to do more work than he thought he should have to do. It is then alleged that the plaintiff was paid certain sums of money, and that he after the completion of the works sent—not to the building owner but—to the defendant accounts shewing a balance for which he was entitled to have the defendant's certificate; that the defendant, without calling on the plaintiff for an explanation or communicating with him, made and sent to the plaintiff and to the company a certificate for a net balance of 251*l.* 14*s.* 4*d.* only. On these facts the plaintiff states his cause of action. [His Lordship read it.] Now it is said that the statement of action is of this limited kind; that the only duty cast on the defendant was a purely ministerial and clerkly duty; that he had to make certain arithmetical calculations; and that, if they had been properly made, 1600*l.* was due to the plaintiff; that he did not make and would not make those calculations which were purely arithmetical and called for the exercise of no judgment and demanded no exercise of opinion at all; and that for not doing this purely ministerial duty, inasmuch as it damaged the plaintiff to the amount of 1364*l.*, the action lies. If, as I have already said, that were the true construction—and these paragraphs put the true construction on the contract—I should have been, as at present advised, of opinion that the action would lie, and I say so assuming the right view of the words "knowingly or negligently" to be that presented to us in the able argument of Mr. Wills, viz. that "knowingly" does not necessarily mean and must not be

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taken to mean fraudulently. It is capable of a milder interpretation, viz., that knowing a particular mode of calculation would bring out a certain result the defendant brought out another, and therefore it was wrong to his knowledge or within his means of knowledge. But when regard is had to the contract, and to the duty to be performed under it, it will be seen plainly that the duty is not merely ministerial or clerkly, and, looking at the contract itself, and the bill of quantities according to which the deductions or additions are to be calculated, it is manifest at a glance that in order to arrive at the amount of additions or deductions a great deal more than arithmetical calculation is necessary. The quality of the work, and the extent to which particular deductions or additions came within particular heads of the bill of quantities, are questions perfectly fit for the determination of an architect, and in many cases it would be necessary, and, probably, in all cases actually required that there should be an exercise of considerable professional judgment and skill, and that before the arithmetical result of so many feet of work and so many pounds and shillings for the work could be arrived at, there must be knowledge of the work, familiarity with the bills of quantities, professional understanding to comprehend the technical terms, and judgment to say under which head the deductions or additions ought to be placed. I think, therefore, it is plain when the documents which I am told we must treat as part of the claim are looked at, that although, no doubt, the result is one of figures, yet before it can be arrived at, there must be an exercise of professional knowledge, skill, and judgment. Moreover, it seems to me that it is so provided for by the contract, and that the true view of the contract is that presented by Mr. Wills, viz., that before the plaintiff can recover sums of money from the building owner, there must be the certificate of the architect to ascertain what sums are due from the building owner to the plaintiff. Now if I have rightly described the position of the defendant with respect to the plaintiff, it follows from the decided cases that this action does not lie. Where indeed the building owner and the architect collude together, and in collusion the architect fraudulently abstains from doing his duty towards the builder, there is the authority for saying that he can maintain an action against the building owner: *Batterbury* v. *Vyse* (1); or the architect: *Ludbrook* v. *Barrett*. (2) It must be left to the Court of Appeal to overrule those cases if they are wrong. They are directly in point, and seem to me founded on clearest sense and justice; but they are not this case, because here neither fraud nor collusion are suggested, unless fraud and mala fides be suggested by the word "knowingly," which, for reasons already given, I do not think can be, nor does Mr. Cave go so far as to say so. I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised.

I will not discuss the principles on which they rest; it is enough to say that in those judgments pronounced by Courts of co-ordinate jurisdiction, and also in the Exchequer Chamber, I entirely concur, not only on authority, but on grounds of reason and sense.

Therefore, it seems to me that the first part of the claim is disposed of, and the demurrer must be allowed so far as it applies to par. 17. It remains only to consider par. 18. I think that what is therein stated is no ground of action at all. There, again, mala fides and collusion are not even suggested. It alleges simply that the architect, who is by the contract to form an opinion, and who has formed an opinion, and expressed it, declines to say on what he grounded it, and to hear argument offered to shew that the opinion was wrongly formed. I think if his position be such as I have described, he is not bound to give the grounds of his opinion, or to reconsider it, and that the person who has taken him for better and for worse (not as architect, for that is the wrong ground to put the case on, but) as one whose opinion is a condition precedent to the obtaining of a sum of money, cannot bring an action against him for refusing to give the ground of his opinion, or to hear evidence tendered to shew that the opinion was wrong.

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(1) 2 H. & C. 42. 9 Jur. N.S. 704 (2) 36 L. T. (N.S.) 616.

I think that is the better ground to put it on, because I at first thought he might on a certain view of the facts be regarded as an arbitrator who had not arbitrated, and that perhaps an action might be maintained (according to obvious analogies), not for doing his duty ill, but for not doing it under any circumstances. But those cases have only been where there has been a dispute between the plaintiff and the building owner, and I doubt whether here any such dispute has arisen. So, assuming that I am right in my supposition that he is made arbitrator between the parties, and on declining to arbitrate could be forced to take upon himself the duty of deciding after reasonable inquiry, I do not think that arises here, for no kind of dispute on the facts before us has arisen.

The demurrer must be allowed.

Denman, J. I am of the same opinion. The plaintiff, who is a builder, entered into a contract with the company to erect a large building; and the defendant is the architect who was named in the contract, as the person appointed and agreed upon by them to do certain acts without which the plaintiff would not be entitled to the money for his work. There is no direct contract between the plaintiff and the defendant. The defendant does not sign it, and is not made a party by being mentioned in it, except for the purpose for which he was mentioned. But it is contended that he is bound by that contract so as to be liable, either as a person who has contracted to do certain things which he has neglected, or that by virtue of his office he owed a duty to the plaintiff which he has neglected. I am not prepared to say that it is impossible to conceive a case in which he might not be liable on the contract itself, knowing that he is named in it, and accepting the duties under it, and receiving certain benefits out of it, as in every case where an architect is employed. A case is conceivable where, by acting under a contract, he might become so far a party as to be liable either under the contract, or in respect of rights and duties arising by reason of the office assumed which would give a right of action to either party. But supposing a duty does arise, the question is what is the amount of the duty? It appears to me that he does not, by undertaking the office of arbitrator, undertake any duty amounting to more than that of honestly performing his functions.

Suppose the case alleged that the defendant, having undertaken the office of architect and arbitrator between the building owner and the contractor, fraudulently or corruptly, or in collusion with the building owner, dishonestly took a course which he ought not to have taken, and so injured the plaintiff, I have, as at present advised, no doubt whatever that an action might have lain against him. There are many dicta to that effect. But the question is, what duty did he here undertake? That depends on the nature of the employment of an architect who acts under a contract of this kind. I do not intend to hold that he is to all intents and purposes an arbitrator, but I think that his duties are very analogous to the duties of an arbitrator, and are quite as much so as were those of the defendant in *Pappa* v. *Rose* (1) or *Tharsis Sulphur and Copper Company, Limited* v. *Loftus*. (2) The argument of Mr. Cave is that under the present contract the architect was not an arbitrator or a person appointed by the parties to decide questions requiring exercise of discretion, skill, or, in one sense, judgment at all, but was a kind of appraiser or valuer, to look at certain work, cast up certain figures, and do rather clerkly than judicial work, or the work of an arbitrator, which requires the exercise of skill and judgment. So to hold would be to ignore the experience of every member of the bar and bench who has had to do with building contracts, and as very many of us have had great experience of them we ought to take it into consideration. We know that it frequently happens in references that there will be skilled architects called on one side and on the other who very often honestly differ as to the proper mode of measuring up, and disagree to the extent of hundreds of pounds as to what is owing under a bill of quantities. This appears to me enough to shew that an architect is not to be dealt with as a mere caster up of figures, who, if he makes a mistake, is to be looked upon as guilty of negligence because he has cast them up wrongly, but as one having to do something requiring judgment, discretion, and skill, and I think that he is a person

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(1) Law Rep. 7 C. P. 32, 525.

(2) Law Rep. 8 C. P. 1.

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exercising very important functions requiring skill and judgment in cases of this kind. That being so, *Pappa* v. *Rose* (1) and *Tharsis Sulphur Company* v. *Loftus* (2) apply. The only distinction pointed out by Mr. Cave was that in one case an actual dispute had arisen, and therefore the defendant was an arbitrator, whereas he might not be so before a dispute. But it seems to me that the architect is an arbitrator from the beginning to the end of the contract, he is throughout to have his eye on the work, and give certificates from time to time, all having reference to his final certificate, and, unless he gave the duty up altogether from the first appointment, he is from the first a person exercising judgment on a matter on which the parties cannot exercise judgment.

I think, therefore, that the parties have trusted to him, and that from the beginning he must exercise his functions fairly and honestly between them, and that if he violates that duty he is liable to an action. If he honestly performs them then he honestly performs his bargain, if it be a bargain, or his duty, if it be a duty, arising from the acceptance of the functions, and the parties must abide by it. But it is said that paragraph 17 carries the case further, because it alleges that the defendant "knowingly or negligently" certified for a much less sum than was in fact due. It would, I think, be a bad precedent were we to hold that by cramming into the claim such a word as that it could be expanded into meaning "fraudulently, dishonestly, and corruptly," charges quite different from what was here intended. But I think that word "knowingly" equivalent to "knowing the figures put down." It would have been easy, if necessary, to use the words "fraudulently and corruptly." Paragraph 18 remains to be considered. The answer to the contention in it appears to me to be that the defendant would have done very wrong if he had, at the mere request of the plaintiff, and without any dispute having arisen between the parties, but on the complaint of the plaintiff alone, re-opened the matter and determined to re-consider his certificate. No dispute had arisen between the parties. The only dispute which had arisen was between him and the builder, and all that

(1) Law Rep. 7 C. P. 32, 525.

(2) Law Rep. 8 C. P. 1.

appears was that the builder was dissatisfied with the certificate. I think that claim, also, is ill founded, and that our judgment should be for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Field, Roscoe, & Co.*
Solicitors for defendant: *Taylor, Hoare, & Taylor.*

BERRINGER *v.* THE GREAT EASTERN RAILWAY COMPANY.

March 11.

Master and Servant—Action by Master for Injury to Servant—Pure Tort—Railways.

Claim alleged that the servant of the plaintiff took a ticket and travelled by the L. T. & S. Railway; that the defendants, the Great Eastern Railway Company, supplied the engines, drivers, and firemen for working the traffic of the L. T. & S. Railway, and also the signalmen for working the said traffic at the S. Junction; that the L. T. & S. train in which the servant travelled came into collision with a train of the defendant company at the junction, through the negligence of the defendants' signalman there; that the servant was hurt, whereby the plaintiff lost his services and was damnified. On demurrer:—

Held, that the action was against independent wrong-doers, not parties to the contract of carriage, for a pure tort and could therefore be maintained.

CLAIM: that the plaintiff John Berringer carried on the business of a butcher, and was the father of the plaintiff, Frederick Berringer, who was an infant. (1)

The London, Tilbury, and Southend Railway Company were carriers of passengers for hire between Fenchurch Street and Southend, and the defendant company were carriers of passengers for hire between Fenchurch Street and Woolwich. The defendant company supplied the engines, drivers, and firemen for working the traffic of the London, Tilbury, and Southend Company's line, and also the signalmen for working the said traffic at Stepney Junction.

The plaintiff Frederick took a ticket at Fenchurch Street station, by a train leaving there at a certain hour upon the London, Tilbury, and Southend Company's line to Southend, and proceeded as far as Stepney Junction, when the said train came violently into collision with a train belonging to the defendant company proceeding from Woolwich to Fenchurch Street, and the plaintiff Frederick was thereby injured. The collision was caused through the negligence of the defendants' servants, partly owing to the defective construction and working of the defendants' down home main line signal arm at Stepney Junction, in that it would not shew the "Danger" signal when it was so required, and partly owing to the fact that the defendant company's signalman at the said junction so negligently and improperly shifted certain points there, as to turn the down train in which the plaintiff Frederick was travelling across the road of an up-train belonging to the defendant company, then leaving Stepney Junction for Fenchurch Street, whereby the former train ran into the latter and the collision occurred.

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(1) The infant sued, by his father as his next friend, for the personal injuries he had sustained.

Par. 5. Prior to the 5th of August, 1878, the plaintiff Frederick was in the habit of assisting the plaintiff John Berringer in his business. Since that date he had been utterly unable to render his father any assistance, whereby the plaintiff John Berringer had lost his son's services and had been put to expense.

Demurrer to so much of the claim as supported the alleged claim of the plaintiff John Berringer mentioned in the 5th paragraph thereof, on the ground that the facts therein alleged shewed no contract between the plaintiff John Berringer and the defendants or the London, Tilbury, and Southend Railway Company to carry the plaintiff Frederick Berringer.

Nicoll, for the defendants. The claim by the father to recover for the loss of services of the son, who is his servant, is bad. There was no contract between the father and the defendants, and the breach of duty shewn in the claim arises out of contract. But the son took the ticket, and any damage sustained was from a breach of the contract with him. "It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as, by beating him. On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong, but only in respect of a duty arising out of and founded upon a contract with the servant:" per Willes, J., *Alton* v. *Midland Ry. Co.* (1)

[*Reginald Brown*, for the plaintiff. Were this action against the carrying railway company that case would, no doubt, be conclusive; but the plaintiff has taken care to sue the defendant company for a mere trespass, by causing a collision between their train and that in which his servant was carried.]

The defendants are connected with the Tilbury Company, and have, by pleading to the claim, accepted their responsibility. No trespass is alleged or shewn, but negligence in performing the contract of carriage. If the claim were for a pure tort the plaintiff would not have alleged that the defendants supplied the engines, drivers, and firemen for working the traffic of the Tilbury line. It is a tort founded on contract: see *Martin* v. *Great Northern Ry. Co.* (2)

"The form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract;" per Mansfield, C.J.: *Powell* v. *Layton.* (3) There was no privity of contract between the plaintiff and the defendants: *Winterbottom* v. *Wright.* (4)

LOPES, J. I need not trouble Mr. Brown to argue, for I think the claim is valid. The claim is against the company not parties to the contract of carriage, for a pure tort, such as would be committed if a vehicle in the highway were wrongfully driven against or across the path of another vehicle, whereby a servant therein was hurt, and his master lost his services.

Demurrer overruled.

Solicitors for plaintiff: *Gush & Phillips.*
Solicitor for defendants: *Capel A. Curwood.*

(1) 19 C. B. (N.S.) 213, at p. 239; 34 L. J. (C.P.) 292, at p. 297. 11 Jur. N.S. 672
(2) 16 C. B. 179.
(3) 2 B. & P. 365, at p. 370.
(4) 10 M. & W. 109.

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March 12.

THE IMPERIAL MARINE INSURANCE COMPANY *v.* THE FIRE INSURANCE CORPORATION, LIMITED.

Ship and Shipping—Marine Insurance—Reinsurance against Fire—Successive open Policies—Usage of Underwriters—Declarations of Risk—Order of—Rectification of—Negligence in declaring.

The defendants, a fire insurance corporation, agreed to reinsure the plaintiffs, a marine insurance company, against loss by fire up to 1000*l.* by any one vessel upon all coal-laden ships insured by the plaintiffs at and from certain ports to others. A policy was accordingly subscribed by the defendants whereby in consideration of 250*l.* they undertook to reinsure the plaintiffs against loss or damage by fire to the extent of 50,000*l.* by the ships as might be declared at and from certain ports to others, the policy to be subject to the same clauses and conditions (as far as they related to fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for a year, and include only coal-laden vessels, and the policy was to be supplemented by further policies on like terms should the amount of it not prove sufficient for the year's transactions. This and a second policy being exhausted by declarations of risk made under them, a third policy was applied for by the plaintiffs and issued to them. A risk, incurred prior to the date of the second policy, was not included in those declarations and was followed by a loss of cargo from fire known to the plaintiffs when the third policy issued, but, through mere neglect on the part of their manager, was not declared until afterwards. Taken in chronological order, this risk came under the third policy, if any.

In an action to recover for the loss, the Court, empowered to decide all questions in the case:—

Held, that although the defendants had reinsured against fire only, their agreement was in respect of a marine risk and subject to the usage of underwriters stated in *Stephens* v. *Australasian Insurance Co.* (Law Rep. 8 C. P. 18), and that, therefore, the policies attached to the goods in order of shipment, and the declarations must be rectified to make them correspond with it, and this might be done even after loss; that the negligence of the plaintiffs' manager did not deprive them of their right to do it, and consequently that they were entitled to recover.

FURTHER CONSIDERATION. The nature of the action and the facts and admissions in it were thus stated in the judgment of the Court:

This case came before Mr. Justice Lopes for trial last Summer Liverpool Assizes. The jury were discharged by consent without a verdict, and all questions were left to his decision.

The plaintiffs are a marine insurance company carrying on business at Liverpool, and the defendants are a fire insurance corporation.

In November, 1876, it was agreed between the plaintiffs and defendants that the defendants should, upon certain agreed terms, reinsure the plaintiffs against loss by fire to the extent of not more than 1000*l.* by any one vessel upon all coal-laden ships, which should be insured by the plaintiffs under their policies at and from certain agreed ports to certain other agreed ports.

In accordance with such agreement the defendants subscribed and issued to the plaintiffs a policy dated the 28th of February, 1877, whereby the defendants in consideration of 250*l.* undertook to guarantee or reinsure the plaintiffs against loss or damage by fire and the consequence thereof to the extent of 50,000*l.* by the ships or vessels as might be declared at and from certain ports therein mentioned to destination, the said policy to be subject to the same clauses and conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. In the said policy it was provided that the arrangement was to be in force for one year from the 1st of October, 1876, and was to include only such vessels as were coal-laden. It was also provided that the said policy was to be supplemented by further policies on like terms should the amount thereof not prove sufficient for the year's transactions.

Declarations were made on the 19th of February and on the 29th of June, such declarations were far in excess of the policy. On the 9th of July defendants subscribed and issued a second policy for 50,000*l.* similar in terms in every respect to the former policy.

On the 7th of June the plaintiffs insured a coal-laden ship called the *Hampden* on a voyage between the prescribed ports. The *Hampden* was lost on the 18th of September. The loss was posted at Lloyd's on the 24th of December. Further declarations were made on the 10th of August, and were in excess of the second policy. The *Hampden* was not declared either on the 29th of June nor on the 10th of August.

On the 24th of October the plaintiffs applied to the defendants for a covering slip, which was sent them by the defendants, and on the 25th of October a third policy was subscribed and issued by the defendants in the same terms in all respects as the two previous policies. On the 2nd of November the plaintiffs declared the *Hampden*, and claimed for a loss. At this time and when the third policy was effected the plaintiffs knew of the loss of the *Hampden*.

It was admitted at the trial, and in the argument, that the plaintiffs had taken a risk of a coal cargo in respect of the *Hampden*, and that there was a loss which would be covered by the policy of insurance, if the plaintiffs were not debarred from attributing it to one of the said policies by reason of delay in declaring the risk. It was also undisputed that, taking the risks in chronological order, the *Hampden* did not come under either of the first two policies, which were by previous risks exhausted, when the plaintiffs took the risk in the *Hampden*, but must rank under the third policy (if under any), which was effected on the 25th of October.

It was also undisputed that the plaintiffs' manager had been most negligent in not declaring the *Hampden*, but the defendants admitted that there was no want of good faith on his part nor on the part of the plaintiff company.

It was also admitted that a usage in fact existed such as that in *Stephens* v. *Australasian Insurance Company* (1), to the effect that in the case of open policies on ships to be declared there is a usage of merchants and underwriters that the policy attaches to the goods as soon as, and in the order in which they are supplied, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment the assured is bound to rectify the declaration, which is sometimes done after loss.

1878. Dec. 14. *C. Russell, Q.C.*, and *Myburgh*, for the plaintiffs. The loss of coal cargoes in ships is undoubtedly a marine risk. The defendants undertook to reinsure against it, and, as is admitted, were acting intrà vires in doing so. Then, having accepted such risks,

(1) Law Rep. 8 C. P. 18.

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they are affected by the customs regulating the business of marine insurance, and their contract with the plaintiffs was therefore subject to the custom found and stated in *Stephens* v. *Australasian Insurance Company* (1): "According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to declare some of the risks, and remain his own insurer as to the others. In case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss." If this custom applied, then the plaintiffs were not only entitled, but bound, to rectify their declarations so as to make the risks declared come in chronological order under the policies. They could not pick and choose the risks to be declared, but must, for the advantage of the defendants, who get the benefit of the risks which are run out, declare every risk which was within the terms of the policy, and therefore may claim the correlative right to correct their declarations. A declaration may be altered even after the loss is known, if such alteration be made without fraud: *Stephens* v. *Australasian Insurance Company.* (1) No fraud is suggested here. The provision in the agreement for supplementary policies is equivalent to a covering note or slip, which is a complete and final contract binding upon the underwriters in honour and good faith, and therefore the plaintiffs were not bound to declare at the time of effecting the third policy, that the risk on the *Hampden* had already fallen in: *Cory* v. *Patton.* (2)

Herschell, Q.C., and *Wheeler*, for the defendants. The defendants are a fire insurance corporation. Their limited reinsurance was against fire only, although the original insurance by the plaintiffs was marine. The defendants could neither be expected to know the usages of marine insurance nor to contract with reference to them. Therefore the custom in *Stephens* v. *Australasian Insurance Company* (1) does not apply, and the policy did not attach until the risk was declared, which was not until after loss. A covering slip is, but for the Stamp Acts, an actual policy; but this agreement is to make, as it were, a policy in futuro. *Cory* v. *Patton* (2) does not apply. In the present case the point to be regarded is the time at which the stipulation was to come into operation, viz., when the second policy became exhausted. But the loss occurred and was known before it was exhausted, and the declaration was afterwards made.

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(1) Law Rep. 8 C. P. 18.

(2) Law Rep. 7 Q. B. 304.

Secondly, the negligence of the plaintiffs' manager in declaring the loss disentitles them to recover. His improper mode of conducting business was calculated to afford a dangerous facility of fraud: Parsons on Marine Insurance, ed. 1868, p. 520.

Myburgh, replied. The defendants have chosen to share one of several marine risks, and must be taken to know the usages of the business in which they engage. No reason whatever has been suggested why the usage in question should not apply to these insurance policies; many might be given to shew that it ought to apply. Further, the contract is peculiar. It is that the plaintiffs continuing their ordinary business of marine insurance, shall be reinsured by the defendants for a year. There is no necessity for any declaration at all. It is remarkable that the words "as may hereafter be declared" are omitted from the agreement. The only object of the declarations under the contract is to shew when the policies are exhausted. The stipulation for successive policies is even more effective than the ordinary slip, because it is inserted in a valid signed and stamped policy.

That negligence should avoid a contract is a proposition unknown to our law.

Cur. adv. vult.

March 13. LOPES, J., after stating the case as hereinbefore set out, proceeded: The defendants contended that they, the defendants, not being a marine insurance company, the usage stated in *Stephens* v. *Australasian Insurance Company* (1) did not attach. As the case depends mainly on whether this custom applies or not, it is convenient first to consider that question. I think it does. The argument is that the usage does not attach because the plaintiffs are insurers against marine risks, and the defendants are insurers against fire. It is conceded, however, that it is within the powers of the defendant company to reinsure against loss by fire in case of ships at sea. The plaintiffs here insure against perils by sea generally, and in order to ease their liability, they reinsure their risks in respect of coal-laden vessels for a limited amount in each case and in respect of fire only, and between specified ports, with the defendants. The contract with the defendants is a contract of fire insurance no doubt, but a contract of fire insurance in respect of a marine risk. The defendants when they entered into that contract were doing the trade or business of marine insurance. The plaintiffs in the course of their business undertook certain marine risks, the defendants for their own benefit take upon themselves to indemnify the plaintiffs against one of those marine risks (being a risk against fire). It was a marine risk in the hands of the plaintiffs, and did not become less so when undertaken by the defendants. When the defendants contracted with the plaintiffs they contracted with them according to the usage of the particular trade or business to which the contract related. It related to the trade or business of marine insurance. I think, therefore, the usage in *Stephens* v. *Australasian Insurance Company* (1) applies.

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(1) Law Rep. 8 C. P. 18.

(2) Law Rep. 7 Q. B. 304.

This being my view, it is not necessary for me to determine how the case would stand if that usage did not attach. I will only say that it appears to me that if the usage did not attach the contract could not be regarded as an ordinary open policy on ship or ships to be hereafter declared. Having regard to the terms of the contract between the parties, I should be inclined to adopt the argument that there is no necessity, except as a matter of convenience (as shewing when one policy was exhausted,

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(1) Law Rep. 8 C. P. 18.

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and another had become necessary), that there should be any declaration, but that the policy attached when the risk was incurred.

It was argued by Mr. Wheeler, on the part of the defendants, that the negligence of the plaintiffs' manager was such that it afforded facilities for fraud, and consequently disentitled the plaintiff from recovering. A passage from Parsons on Insurance was relied on. I am not prepared to hold there was such negligence, nor can I find any authority for Mr. Wheeler's contention. I am of opinion that the plaintiffs, having acted in good faith, are not debarred by that delay in making a declaration on the *Hampden* from recovering.

Judgment for the plaintiffs, 1000*l. with costs.*

Solicitors for plaintiffs: *Field & Roscoe.*
Solicitors for defendants: *Learoyd & Co.*

March 22.

[IN THE COURT OF APPEAL.]

BRYANT *v.* LEFEVER AND ANOTHER.

Easement—Right to Passage of Air—Action for obstructing Access of Air to Chimney of Dwelling-House—Nuisance.

App Cas
50 – 1
761

The access of air to the chimneys of a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act (2 & 3 Wm. 4, c. 71). (1)

Webb v. *Bird* (13 C. P. (N.S.) 841; 31 L. J. (C.P.) 335) followed.

The plaintiff and the defendants were occupiers of adjoining houses. For more than twenty years the occupiers of the plaintiff's house had enjoyed the access of air to the chimneys of it. The defendants took down their house, and rebuilt a wall to a greater height, thereby causing the plaintiff's chimneys to smoke:—

Held, that no action was maintainable by the plaintiff against the defendants, either on the ground that the plaintiff had acquired an easement which the defendants had interfered with, or on the ground that the nuisance complained of had been created by the defendants.

CLAIM alleged that the defendants occupied premises adjoining the plaintiff's house, and that "before the circumstances herein-

(1) S C 8 Jur N.S. 621

after set out the plaintiff had always, and for much more than twenty years, a free access of air to his chimneys, which were on the side of his house next to the house of the defendants. About the month of June, 1876, and after the plaintiff was in occupation of his said house, the defendants raised the walls of their house so high, and put stacks of timber on the roof of the said house, so as to interfere with and prevent the free access of air to the plaintiff's chimneys, and prevented a proper draught in the same, and the plaintiff was totally unable to use his said chimneys, and the enjoyment by the plaintiff of his house was much diminished and injured."

Defence: a denial of the allegations of the claim. Issue thereon.

At the trial before Lord Coleridge, C.J., and a special jury during the Hilary sittings in Middlesex, 1878, the following facts were proved:—

The plaintiff and the defendants were occupiers of adjoining houses, which were of about the same height. Before 1876 the plaintiff was able to light a fire in any room of his house without the chimneys smoking; the two houses had remained in the same condition some thirty or forty years. In 1876 the defendants took down their house, and began to rebuild it. They carried up a wall by the side of the plaintiff's chimneys much beyond its original height, and stacked timber on the roof of their own house, and thereby caused the plaintiff's chimneys to smoke whenever he lighted fires.

Lord Coleridge, C.J., allowed the claim to be amended by introducing an allegation that, by reason of the facts therein mentioned, the defendants created a nuisance to the injury and prejudice of the plaintiff in respect of his enjoyment of his house and premises.

The jury found in substance that for more than twenty years there had been free access of air to the chimneys of the plaintiff's house, and also that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises. They assessed the damages at 40*l.*, and Lord Coleridge, C.J., directed judgment to be entered for the plaintiff.

The defendants appealed.

1878. Dec. 11, 12. *Gates, Q.C.*, and *Edward Clarke*, for the defendants. Although the jury have found in favour of the plaintiff, yet the defendants are entitled to succeed. No action will lie for the interference by them with the access of air to the plaintiff's chimneys. The defendants cannot be prevented either from raising the height of the roof of their own house, or from placing timber upon it. The plaintiff cannot claim that smoke shall freely escape from his building, either as a natural right of property, or by way of easement. *Webb* v. *Bird* (1) is very like the present case, and is practically conclusive upon it. The cases as to support for buildings from adjoining soil cited in *Angus* v. *Dalton* (2) shew that the analogous claim to the access of air to a chimney is unsustainable. The alleged nuisance merely consisted in hindering the escape of something disagreeable, which the plaintiff himself has produced upon his own premises.

A. Cock (*Staveley Hill, Q.C.*, with him), for the plaintiff. An action will lie for stopping the flow of air, whereby the convenience or value of a building is lessened: *Aldred's Case.* (3) It is found by the jury that the comfort of human existence in the plaintiff's house has been materially interfered with; and this is sufficient to entitle him to redress by either injunction or action, or both: *Walter* v. *Selfe* (4); and as by the erection on the defendants' house the smoke which would otherwise escape from the chimneys was forced back into the plaintiff's house, he is entitled to relief, on the ground that he is suffering inconvenience from a nuisance: *Dent* v. *Auction Mart Co.* (5)

[COTTON, L.J. In that case Wood, V.C., alludes to the distinction between a claim to the access of air and a claim to the access of light; and this distinction is also pointed out by Lord Selborne, L.C., in *City of London Brewery Co.* v. *Tennant.* (6)]

Moreover, the occupiers of the plaintiff's house have for twenty years enjoyed as of right the access of air to the chimneys; and this is sufficient to raise the presumption, that the enjoyment was

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(1) 10 C. B. (N.S.) 268; 30 L. J. (C.P.) 384; in Ex. Ch. 13 C. B. (N.S.) 841; 31 L. J. (C.P.) 335.

(2) 3 Q. B. D. 85; on appeal, 4 Q. B. D. 162.

(3) 9 Rep. 58 b.

(4) 4 De G. & Sm. 315, at p. 323; 20 L. J. (Ch.) 433, at p. 435.

(5) Law Rep. 2 Eq. 238, at p. 252.

(6) Law Rep. 9 Ch. 212, at pp. 220, 221.

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commenced by virtue of a grant: Starkie on Evidence, part iii. ch. i. p. 750 (4th ed.), and this being a presumption of law, it is unnecessary that the jury should find that a deed of grant was actually executed: Taylor on Evidence, vol. i. part i. ch. v. par. 132, p. 148 (7th ed.); *Deeble* v. *Linehan.* (1)

Gates, Q.C., in reply. The act, of which the plaintiff complains, was done by the defendants upon their own property: it is for the plaintiff to make out that it was unlawful.

Cur. adv. vult.

1879. March 22. The following judgments were delivered:—

6 App Cas 816

BRAMWELL, L.J. The judgment which I am about to read is that of Brett, L.J., and myself.

The plaintiff says that he is possessed of a house, that for more than twenty years this house and its occupants have had the wind blow to over and from it, and that he has, as so possessed, the right that it should continue to do so: that the defendants have interfered with this right and prevented the free access and departure of the wind: he adds that they have committed a nuisance to him as so possessed. He has proved that he is possessed of a house more than twenty years old; that the wind had access to it and passage over it for twenty years without the hindrance recently caused by the defendants; that the defendants have caused a hindrance by putting on the roof of their house (which is as old as the plaintiff's), timber, to a considerable height, thereby preventing the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others: that this causes his chimneys to smoke as they did not before to the extent of being a nuisance. The question is if this shews a cause of action. First, what is the right of the occupier of a house in relation to air independently of length of enjoyment? It is the same as that which land and its owner or occupier have: it is not greater because a house has been built: that puts no greater burden or disability on adjoining owners. What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages, as nature would produce them;

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(1) 12 Ir. C. L. Rep. 1.

there is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow; a right that the rain, which would pass over the land, should not be stopped and made to fall on it; a right that the heat from the sun should not be stopped and reflected on it; a right that the wind should not be checked, but should be able to escape freely; and if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours, rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit-tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other. But nobody could doubt that in such case no action would lie; nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, as much so as the building of a wall, or planting of a fence or an orchard. Of course, the same reasoning applies to the putting of timber on the top of a house, which, if not a common, is a perfectly lawful act, and it would be absurd to suppose that the defendants could lawfully put another storey to their house with the consequences to the plaintiff of which he complains, but cannot put an equal height of timber. These are elementary and obvious considerations, but if borne in mind will assist very materially in the decision of this case.

The plaintiff then, merely as possessed of land or house, has not the right claimed. But he goes further, and says that the house and its owner and occupiers have had the enjoyment of this benefit for twenty years. He therefore relies on that as shewing a prescriptive title, or title by lost grant. Whether he has so stated his claim as to raise such a case it is not necessary to say, for we are of opinion that even if he has, he has not established it, that no such right as he claims can be established by mere enjoyment without interruption for however long a period. It

[illegible]

certainly cannot be claimed under the Prescription Act (2 & 3 Wm. 4, c. 71); nor can it by lost grant, unless of such a character that it could be claimed by the common law prescription, for the expedient of a lost grant is only applicable to cases where something prevents the application of the common law prescription; we do not say there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice; whether it could against assigns without notice it is not necessary to say. But the lost grant doctrine is ancillary to the common law prescription doctrine; can this right, then, be claimed under that? Now, certainly, the land as such has enjoyed this of right for all time, since the sun first shone and the wind first blew; and it is not a case of twenty or any finite number of years. But that enjoyment is the result of the natural right of which we have spoken, and not of an acquired right. Then, does the existence of a house on the land for twenty years make any difference? None. The owner of the land enjoyed the free passage of the air over his land when it was a field, subject to the right of his neighbours to build on their own land, or to do on their own land any lawful act. He now enjoys it over his land with a house on it, subject to the same rights. If the house on his land is less commodious by reason of any lawful act of his neighbour done on the adjoining land, then, to use the expression of the judges in *Bury* v. *Pope* (1), "it was his folly to build his house so near to the other's land." It may be said that if this reasoning is correct, it is applicable to lights; so it is to a great extent, and any one who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle. Willes, J., says it is anomalous: *Webb* v. *Bird* (2); and, per Blackburn, J.: *Webb* v. *Bird*. (3) In the case referred to of *Bury* v. *Pope* (1), it was held that where there are owners of adjoining pieces of land, and one builds a house, and for thirty or forty years has access of light to it, yet the other may build a house adjoining and shut out the light. This shews the general principle, though the law

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(1) Cro. Eliz. 118.

(2) 10 C. B. (N.S.) at p. 285.

(3) 13 C. B. (N.S.) at p. 844.

[illegible]

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as to light is now different, as a right is gained to it by enjoyment. But there is this difference between the present claim and the claim to light. The right in that case is always limited to the particular window or aperture through which the light and air have had access; it is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord Wensleydale (1) thought this a very strong thing as a great burden on the adjoining landowner. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore* v. *Richards* (2) is applicable, namely, that the right claimed is not one the law allows, being too vague and uncertain; one the acquisition of which the adjoining owner could not defend himself against; and that the remedy of the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper. We are of opinion that on principle the plaintiff fails to make out his right as claimed; the authorities are to that effect. *Webb* v. *Bird* (3) is really in point. It is true that in that case the mill appeared to have been built in 1829. I believe the date of the building of the plaintiff's house in this case did not appear: it will hardly be supposed to be 100 years old. But the reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary, if the date of the building of the plaintiff's house could not be shewn. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the judges in *Webb* v. *Bird* (3). We may, however, mention *Roberts* v. *Macord* (4), where Patteson, J., was of opinion that a claim like the present could not be supported. All the reasoning and all the considerations that prevailed in *Chasemore* v. *Richards* (2) are opposed to it. Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air had been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place. We are of opinion, then, that the action cannot be maintained on this ground.

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(1) See *Chasemore* v. *Richards*, 7 H. L. C. 349, at p. 386.

(2) 7 H. L. C. 349. 5 Jur NS 873.

(3) 10 C. B. (N.S.) 268; in Ex. Ch. 13 C. B. (N.S.) 841. 8 Jur NS 621

(4) 1 Mo. & Ro. 230.

But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall, that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put up the timber on theirs, and it is really the same, though he did so before the timber was there. But (what is in truth the same answer), if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable. "Sic utere tuo ut alienum non lædas" is a good maxim, but in our opinion the defendants do not infringe it: the plaintiff would if he succeeded.

Cotton, L.J. This is an appeal of the defendants from a judgment of Lord Coleridge in favour of the plaintiff in respect of the interruption of air to the plaintiff's chimney caused by the defendants.

The jury have found, first, that there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; secondly, that the defendants interfered with it; thirdly, that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises; fourthly, that the plaintiff sustained damage 40*l.* by the building of the defendants' wall.

The first question is, whether the plaintiff has, either as a natural right of property or as an easement, a right as against the defendants to have the access of air to his chimney without any interruption by the defendants. In my opinion he has no such right.

In my opinion it would be a contradiction in terms to say that a man has a natural right against his neighbour in respect of a house which is an artificial addition to, and not a user of, the land. That the owner of a house has, as against his neighbour, no natural rights in respect of his house, is shewn by the cases as to subjacent and lateral support. These shew that while every owner of property has, independently of user, a natural right to support for his land, if he adds buildings to his land and thereby requires an increased support, he, in the absence of express grant, can only acquire a right to such support by user, that is, by way of easement. The right (if any) of the plaintiff to the uninterrupted flow of air to his chimney must therefore be by way of easement. Cases to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired. No such point is made in this case, and I am of opinion that a right by way of easement to the access of air over the general unlimited surface of a neighbour cannot be acquired by mere enjoyment. For this *Webb* v. *Bird* (1) is an authority, and as the last decision in that case was in the Exchequer Chamber, it would be sufficient to rely upon the authority of that case. But I think it better to say that I entirely agree with that decision and with the reasons given in this case by Bramwell, L.J. In my opinion, therefore, the plaintiff has no right in respect of the flow of air to or from his chimney.

Every man, however, has a natural right to enjoy the air pure and free from any noxious smells or vapours, and any one who

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(1) 10 C. B. (N.S.) 263; in Ex. Ch. 13 C. B. (N.S.) 841. 8 Jur NS 621

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sends on to his neighbour's land that which makes the air there impure, is guilty of a nuisance. Here it is found that the erection of the defendants' wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said this is a nuisance for which the defendants are liable. Ordinarily this is so, but the defendants have done so, not by sending on to the plaintiff's property any smoke or noxious vapour, but by interrupting the egress of smoke from the plaintiff's house in a way to which, as against the defendants, the plaintiff has no legal right. The plaintiff creates the smoke, which interferes with his comfort. Unless he has, as against the defendants, a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants, because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbour's land. Until a right had been acquired by user, the neighbour might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property on which the liquid filth arises. But the act of his neighbour would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it.

I am of opinion that the judgment appealed from must be reversed.

Judgment for the defendants.

Solicitors for plaintiff: *Sorrell & Son.*

Solicitors for defendants: *Wilkins, Blyth, & Fanshawe.*

1879
March 22.

[IN THE COURT OF APPEAL.]

HAYN, ROMAN & Co. *v.* CULLIFORD AND ANOTHER.

Ship and Shipping—Bill of Lading, Clause excepting Liability for Acts of Master and Crew—Stowage, Negligence in.

5CPD158
QBD527

Bags of sugar shipped by the plaintiffs were carried in the defendants' steamship from H. to L. at an agreed freight. The vessel was chartered for the voyage by P. & K., who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master, or mariners in navigating the ship, and a further clause that the captain, officers, and crew in the transmission of the goods should be considered the servants of the shipper, owner, or consignee. The sugar was negligently stowed under oxide of zinc and was consequently damaged. It did not appear how the sugar came to be shipped, nor with whom the plaintiffs made the contract of carriage:—

Held, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such a manner as to come into contact with a mischievous substance.

APPEAL from the judgment of Denman, J., in favour of the plaintiffs. (1)

Action by the plaintiffs, the shippers of certain sugar, against the defendants, who were shipowners, to recover damages for injuries to the sugar by reason of its having been negligently stowed on board the defendants' ship.

By a charterparty dated the 15th of November, 1877, made between the defendants, owners of the ship *Cleanthes*, and Pott & Korner, merchants, through their ship-broker W. Zoder, it was agreed that the ship, after discharging her inward cargo, should load from the merchants a full and complete cargo of general lawful merchandise at Hamburg, and proceed to one wharf only in London, as ordered by charterer's correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7*s.* 6*d.* per ton gross weight delivered; "it being agreed that for the payment of all freight, dead freight, and demurrage, the master or owner shall have an absolute lien on the cargo, which lien they shall be

(1) 3 C. P. D. 410.

bound to exercise; the charterer's liability to cease when cargo is shipped, and bills of lading signed; the captain to sign bills of lading at rates as presented without prejudice to this charterparty."

Pott & Korner, on the arrival of the ship at Hamburg, put her up as a general ship; and the plaintiffs shipped 280 bags of sugar on board the vessel to be carried to London. At the time of the shipment they had no knowledge of the charterparty. The bill of lading was as follows: "Shipped in good order and well-conditioned, in and upon the steamship *Cleanthes,* whereof is master P. Andrews, now lying at Hamburg, and bound for London, 280 bags of sugar, &c., which are to be delivered in like good order and condition to Hayn, Roman & Co., or their assigns, freight at the rate of 7*s*. 6*d*. sterling plus 10 per cent. per ton gross weight to be paid by consignees. The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss, or damage, of whatsoever nature or kind, or however occasioned, from machinery, boilers, steam and steam navigation, or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods as between the shipper, owner, or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner, or consignee. In witness whereof, the master or agent of the ship has signed four bills of lading of this tenor and date. Dated in Hamburg, 19th Nov., 1877. Pott & Korner, agents."

At the trial there was no evidence as to the employment or otherwise of a stevedore in loading the cargo; but the defendants in answer to interrogatories stated that they believed the cargo was stowed by a stevedore employed by Zobel, who was the agent of the ship at Hamburg, at the expense of the ship. On the arrival of the ship in London, the plaintiffs, who were the holders of the bill of lading, took delivery of the sugar, and paid the freight to W. Watkins, the defendants' agent in London, and who gave a receipt to the plaintiffs headed "Freight, per *Cleanthes*," and signed "received for the owners." It turned out on examination of the sugar by the plaintiffs that, owing to certain casks of oxide of zinc having been stowed at Hamburg on the top of the sugar, the 280 bags were totally spoilt.

From the correspondence admitted at the trial it appeared that on the 4th of December, 1877, the defendants' firm in London wrote to the defendants in Sunderland, stating that a serious claim was pending, "apparently through the fault of the captain. Watkins will no doubt make the best of the case for the steamer; but why the captain stowed poison in casks on top of sugar in bags it is difficult to understand, and may prove serious to him." On the 5th of December the plaintiffs wrote to Watkins demanding the full value of the sugar. On the 6th of December Watkins replied, denying that the sugar was totally spoilt, and stating "if damaged no doubt it was by perils of the sea." On the 10th of December Watkins, under instructions from the defendants, referred the plaintiffs to the charterers.

The jury found the damage to the sugar was caused by bad stowage, and assessed the damages at 501*l*. 6*s*.; and the learned judge, after an adjournment of the case for further consideration, held that there was a contract between the plaintiffs and the defendants for the carriage of the goods, and directed judgment to be entered for them.

Dec. 17. *Butt, Q.C.*, and *J. C. Mathew*, for the plaintiffs.

W. Williams, Q.C., and *C. Bowen*, for the defendants.

Two points were argued: first, whether there was a contract to carry with the defendants as shipowners; secondly, if there was, whether the defendants were discharged from liability to the plaintiffs by reason of the exceptive clause in the bill of lading.

The cases cited were those mentioned in the Court below.

Cur. adv. vult.

March 22. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.), was delivered by

BRAMWELL, L.J. This case comes before us in a very unsatis-

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factory way so far as relates to one of the questions principally argued before us. We are not told how the goods came to be shipped, and are left to guess with whom the plaintiffs made their contract of carriage. We are, however, satisfied that the plaintiffs are entitled to recover. The case is in a dilemma. Either there was a contract between the plaintiffs and the defendants, or there was not. If there was a contract between them, it is the one contained in or evidenced by the bill of lading. Now, it is clear that if that is the contract, the defendants are liable on the ordinary contract of a carrier unless (and there is not) there is some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captain, officers, and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore not to the acts and defaults of the stevedore. But it is by these acts and defaults that the goods were damaged. If then there is a contract between the plaintiffs and defendants, the defendants are liable. So also if there is not. For if so, the case is this: The goods were lawfully with the defendants' licence in their ship, and they tortiously so dealt with them that the goods were injured. It was found, as a fact, that the loading of the oxide was negligent. It was therefore wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say intentionally, that it would injure the plaintiff's goods, it is clear they would be liable. But what difference does it make, that they did it ignorantly? It may be asked where is the duty of care? I answer that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance; an act and wrongful. Suppose A. lets B. a horse, B., with C.'s licence, puts up at C.'s stables for reward to C. from B., C. turns into the stables loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A. if he omitted to feed him; so here justice is done, though indirectly. It is certain

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that if the charterers sued on the charter in respect of the complaint in this action there would be no defence, and it is certain that they ought to sue if necessary for the benefit of the plaintiffs. The judgment must therefore be affirmed.

Judgment affirmed.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Hollams, Son, & Coward.*

1878
Nov. 11.

[IN THE COURT OF APPEAL.]

CROWLE *v.* RUSSELL AND ANOTHER.

Practice—Procedure—Stay of Proceedings—Action to recover Mortgaged Hereditaments—Supreme Court of Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5.

C., being executor of L., mortgaged certain hereditaments, which had formed part of the estate of the deceased. The plaintiff, who became mortgagee, afterwards sued to recover possession of them from her lessees on the ground of a forfeiture for non-payment of rent. C. obtained leave to defend the action as landlord. A suit had been instituted by C. in the Chancery Division to administer the estate of L., and an inquiry had been directed as to the mortgage. An order was obtained by C. staying the proceedings in the action for the recovery of the hereditaments until the proceedings in the Chancery Division should have concluded:—

Held, that the order was bad, and must be set aside.

ACTION for the recovery of land.

John Long was seised in fee of certain hereditaments subject to two charges. He died in 1858, and his executors, of whom Clarke was one, in 1861 caused the hereditaments to be conveyed in fee to Crowle to secure the sum of 700*l.*, the two original charges being paid off. Upon the 25th of March, 1877, Crowle with the consent of the equitable tenant for life under the will of Long granted to Russell and Farmer a lease of the mortgaged hereditaments for the term of fourteen years. By the lease the rent was payable to the equitable tenant for life, until Crowle should give notice that it was to be paid to him: it also contained a clause of re-entry upon non-payment of rent. Upon the 11th of December, 1877, Crowle died, having devised and bequeathed all his real and personal estate to his wife, the present plaintiff, whom he appointed his executrix. Upon the 4th of January, 1878, notice was given to the lessees to pay the rent to the plaintiff. This they neglected to do, and upon the 21st of June the writ in the present action was issued to recover possession under the clause of re-entry for non-payment of rent. An order was made at chambers giving Clarke leave to appear and defend as landlord. The plaintiff did not appeal against this order. Before the commencement of the present action a suit had been instituted in the Chancery Division for the administration of the estate of John Long, in which Clarke was the plaintiff and the beneficiaries under the will of Long were the defendants. In this suit an order had been made directing an inquiry as to the validity of the mortgage.

The Common Pleas Division, composed of Mellor, J., and Huddleston, B., substantially affirming an order made at chambers, ordered that the present action should be stayed until the proceedings in the Chancery Division were concluded, if the plaintiff's rights in such proceedings were adequately protected.

The plaintiff appealed.

Bleby (*Crispe*, with him), for the plaintiff. The order of the Common Pleas Division cannot be supported. Although the plaintiff is a mortgagee, yet until she has been paid off she is entitled to the benefit of all securities for the payment of the debt. The lessees having failed to pay the rent pursuant to the notice, the term is forfeited, and the plaintiff as assignee of the reversion is entitled to re-enter. The defendant Clarke relies upon the existence of the administration suit as a ground for staying this action; but the parties in the two actions are not the same, and as the mortgage was created not by Long but by his executor, the plaintiff cannot prove against Long's estate, and is not bound by the proceedings in the Chancery Division. *Farhall* v. *Farhall* (1) is conclusive upon this point.

Chaloner Chute, for the defendant Clarke. The order of the Common Pleas Division is right. Although no authority precisely in point is to be found amongst the decisions of the Court of Chancery, yet the present case falls within the principle that where the estate of a deceased person was being administered by the Court, a creditor would not be allowed to enforce payment of his debt by action in a Court of Common Law: *Rouse* v. *Jones*. (1) These Courts it is true have been abolished, and the Chancery Division has not power to restrain an action in another division: Supreme Court of Judicature Act, 1873, s. 24, sub-s. 5 (2); but by this enactment each division has power to stay such actions brought in it, as the Court of Chancery would have restrained by injunction. And further, even if the Court of Chancery would not have interfered by injunction with this action, the enactment already mentioned confers upon the Common Pleas Division a discretionary power to do so. As the question between the parties depends upon the law of mortgage, it can be conveniently disposed of in the Chancery Division; and this Court ought not to interfere with the discretion exercised by the Common Pleas Division. Moreover the plaintiff has not appealed from the order allowing Clarke to defend as landlord: she has thereby admitted his title as mortgagor, and he ought to be allowed an opportunity of providing the funds for paying off the incumbrance.

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(1) Law Rep. 7 Ch. 123.

COTTON, L.J. I have been requested to give judgment first, because I am familiar with the practice formerly existing in the Court of Chancery. I think that the order made in the Common

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(1) 1 Ph. 462.

(2) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 5: "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice, and the Court shall thereupon make such order as shall be just."

Pleas Division cannot be supported, for if it were allowed to stand it would seriously affect the security enjoyed by mortgagees. The only ground upon which it has been argued to be maintainable is the existence of the suit for administration; and it has been contended that as the decree in that suit will provide for the payment of the incumbrances, the plaintiff ought not to be allowed to maintain this action against Clarke, who is entitled to the equity of redemption. An inquiry has been directed as to the mortgage, but if it is valid, the Chancery Division cannot deal with the security against the will of the mortgagee. The decree may direct the mortgaged hereditaments to be sold, but the sale can take place only subject to the right of the plaintiff. In former days the Court of Chancery would stay actions against the personal representatives of a deceased person, whose estate was being administered under its direction, but the Court exercised this power only to prevent the estate from being wasted, and by the practice of the Court the action was stayed only when the creditor could prove against the estate of the deceased, the decree being made for the benefit of all the creditors. Do the facts of this case bring it within that practice? To this question a decisive answer may be given. Crowle, the mortgagee, did not lend the money to the deceased, Long, but to Clarke; and although the plaintiff is the executrix and devisee of the mortgagee, she cannot prove in the administration suit; therefore the former practice does not apply. But even if the testator, Long, himself had created the incumbrance, this order, as it seems to me, could not be maintained; mortgagees have always been favoured in equity, and I know of no case which is an authority for staying the action. It is true that a decree will be made in the administration suit, under which the debt due to her as executrix will probably be liquidated; but the amount of it has not been tendered, and she is not bound by proceedings which, in truth, have been taken behind her back. The lessees under the demise for fourteen years have omitted to pay to the plaintiff the stipulated rent, and she, as mortgagee, is entitled to enforce the remedy conferred by the right of re-entry. If it should prove a convenient course, the action may be transferred to the Chancery Division. For Clarke reliance has been placed upon the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 5; but by that enactment it was intended to give power to stay actions which had been improperly brought, or the prosecution of which the Court of Chancery would have restrained by injunction; it does not apply to the present suit, with which that Court would have declined to interfere.

BRAMWELL, L.J. I am of the same opinion, and for the same reasons. It would be strange if this action could be stayed, when only an indirect benefit can be derived by the plaintiff from the suit in the Chancery Division. She will not be bound by the decision of the questions arising therein. Even if the mortgage were bad, the lessees would be estopped from denying the plaintiff's title, and Clarke, who claims to defend as landlord, cannot be in a better position. Leave has been given to him to defend this action; perhaps that leave ought not to have been given, but in any point of view he cannot have a greater right than the original defendants. Under the old practice equity would not have afforded Clarke any relief, and we ought not to do so now. Suppose that a chattel has been wrongfully taken from its pledgee, he cannot be restrained from suing to recover it. The order of the Common Pleas Division seems to cast doubt upon itself, for it contemplates further applications. It does not do final justice between the parties, and ought not to be allowed to stand.

BRETT, L.J. Two reasons have been suggested for holding that the existence of the administration suit is a good ground for staying this action; first, that the Court of Chancery would have by injunction restrained the plaintiff from proceeding with it; secondly, that by the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 5, power is conferred upon the judges of the divisions of the High Court, at their discretion, to stay actions brought in them. As to the first reason, I do not propose to add anything to what has fallen from the other members of the Court. As to the second, possibly the Common Pleas Division has power under the enactment relied upon to stay the action, and the Chancery Division may have a better machinery for dealing with the conflicting rights of the parties, and if the same question had been raised in the two actions, the order perhaps might have been upheld: but the parties to the administration suit are not the same as the parties to this action, and therefore the same question is not really raised. I do not see any ground upon which this order can be supported.

Appeal allowed.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitors for defendant: *Roberts & Barlow.*

1879
March 14.

STANNANOUGHT, APPELLANT; HAZELDINE, RESPONDENT.

Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 4—*Communicating Information as to Votes before Close of Poll—Personating Agent—Information charging more than one Offence—Jervis's Act*, 11 & 12 *Vict. c.* 43, *s.* 10.

By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4, every officer, clerk, and agent in attendance at a polling-station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station.

An information was laid against the respondent under the above section, charging that he, being a personating agent duly appointed and in attendance at a certain polling-station in connection with a municipal election for a town-councillor, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate before the poll was closed to a certain person or persons certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot-papers or voted at that election. It appeared that the respondent, having been appointed personating agent, as stated in the information, attended at the polling booth with a copy of the burgess-roll, and remained there some hours placing a mark against the name of each voter who obtained a ballot paper, and then before the close of the poll left the station taking with him his copy of the burgess-roll, which he left in the committee-room of the candidate by whom he was employed. There was no proof that the copy of the burgess-roll was seen by any person while in the room:—

Held, that there was not sufficient evidence to warrant a conviction under the above section, as there was no proof that the information as to the voters was actually communicated to any person, and it was not enough that the means of acquiring such information were afforded to any one.

Quære, whether, under 11 & 12 Vict. c. 43, the information was defective as being for more than one offence?

CASE stated by a stipendiary magistrate under 20 & 21 Vict. c. 43.

1879

STANNANOUGHT *v.* HAZELDINE.

1. On the 6th of November, 1878, Stannanought laid an information against Hazeldine charging, that he, on the 1st of November instant, at the borough of Liverpool, being a personating agent duly appointed and in attendance at a certain polling-station in connection with the municipal election for a town-councillor for St. Anne Street ward, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate, without it being for some purpose authorized by law, before the poll was closed, to a certain person or persons certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot-papers or voted at that election, contrary to the form of the statute in such case made and provided.

2. At the hearing on the 19th of November, 1878, it appeared that the information was under the Ballot Act, 1872 (1), and that on the 1st of November, 1878, there was an election for town-councillor pursuant to the Municipal Corporation Act, 1835, the candidates being R. M'Dougall and T. H. Sheen.

5. Pursuant to 6 & 7 Vict. c. 18, s. 85, personating agents were appointed by each candidate, and amongst these the respondent

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(1) By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4, "Every officer, clerk, and agent in attendance at a polling-station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorized by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot-paper or voted at that election, or as to the official mark; and no such officer, clerk, or agent, and no person whosoever, shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling-station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling-station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot-paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot-paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot-paper. Every person who acts in contravention of the provisions of this section shall be liable, on summary conviction before two justices, to imprisonment for any term not exceeding six months, with or without hard labour."

was appointed personating agent by Sheen, and notice of his appointment was duly given to the returning officer.

6. The respondent made the declaration of secrecy required by the 54th rule contained in the first schedule to the Ballot Act, 1872, but s. 4 of the Act was not read over to him as directed by the second schedule to the Act.

8. Mr. Stannanought, the appellant, who was duly appointed and declared to act as presiding officer at the polling-station in which the respondent acted as personating agent, deposed that he acted as presiding officer on the occasion; that he saw the respondent with a part of the burgess-roll in his hand, and that he (the respondent) put a tick opposite the name of every voter when he obtained a ballot-paper. Between 2 and 3 o'clock in the afternoon, he (the appellant) noticed that the respondent had left the booth without his (appellant's) permission. He also noticed that the respondent's part of the burgess-roll was not upon the table where he had placed it on one or two occasions on which he had left his seat in the polling-station. The respondent returned in about a quarter of an hour after the appellant missed him. On being asked by the appellant where his part of the burgess-roll was, he replied that he was not going to work for nothing, and, as his committee had not supplied him with any refreshments, he had given up his part of the burgess-list to them. The appellant told him he had done very wrong, and had committed an offence under the Ballot Act, and also told him he could not remain in the booth, and he left. The respondent had been in attendance at the polling-station from 9 o'clock in the morning until the time he left the station as aforesaid, and had not been supplied with any refreshments during that time. The fact that the respondent left the part of the burgess-roll in the committee-room of the candidate by whom he was employed was admitted. The matters mentioned in this paragraph took place before the close of the poll.

10. On the part of the respondent it was contended,—first, that the information contained two offences, and was therefore bad under the 10th section of 11 & 12 Vict. c. 43, which provides that every information shall be for one offence only, and not for two or more offences. This objection the magistrate overruled, on the

ground that there was really only one offence charged, viz. that of communicating before the poll was closed to some person information as to the names or numbers on the register of voters of certain electors who had or had not applied for ballot-papers. Secondly, that the appellant had no authority or power to lay the information; for his powers were limited to matters arising within the polling-station, and that the information should have been laid by the alderman of the ward. The magistrate overruled this objection, as the Ballot Act does not contain any directions as to the persons by whom informations for offences under it should be laid. Thirdly, that there was no evidence of any communication made by the defendant to any other person, as required by the Act to constitute an offence. Fourthly, that, as s. 4 of the Act was not read over to the respondent at the time that he made the declaration of secrecy, his appointment as a personating agent was informal, and he could not be convicted.

The magistrate held this last objection to be fatal, and dismissed the information.

The questions for the opinion of the Court were,—1. Whether the information was bad for containing two offences,—2. Whether the information should have been laid by the alderman of the ward, instead of the appellant,—3. Whether it was necessary to prove that the respondent communicated information as to the persons who had or had not applied for ballot-papers to some individual person or persons, and,—4. Whether it was necessary, in order that a conviction should take place under the Act, that the declaration of secrecy should be read over to the personating agent by the magistrate.

R. S. Wright, for the appellant. The information discloses one offence only, viz. a breach of the obligation to maintain the secrecy of the voting; no objection, therefore, arises under s. 10 of Jervis's Act, 11 & 12 Vict. c. 43: *Reg.* v. *Scott* (1); *Onley* v. *Gee.* (2) The information clearly would have been insufficient if it had merely alleged that the respondent "did not maintain or aid in maintaining the secrecy of the voting at such station;" and it would not have charged two offences if it had gone on, "in this,

(1) 33 L. J. (M.C.) 15.

(2) 30 L. J. (M.C.) 222.

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to wit, that he did then and there communicate certain information," &c. Then, there being nothing in the Act to prescribe that the information for an offence under it shall be laid by any particular person, the magistrate was right in holding it to be well laid by the appellant: *Cole* v. *Coulton.* (1) As to the third question submitted to the Court, the evidence of communication here was all that could reasonably be given or expected. It was shewn that the book was left by the respondent in the committee-room of the candidate for whom he acted as personating agent. It would be impossible to shew that any of the members of the committee had actually looked into the book; and it is equally impossible to doubt the object for which the book was left. The question was one of fact, and it is concluded by the finding of the magistrate that the respondent did violate s. 4 of the Ballot Act, 1872.

[The decision of the Court upon this point made it unnecessary to consider that on which the magistrate decided.]

Fullarton, for the respondent, was not heard.

BRAMWELL, L.J. I think our judgment must be for the respondent. I am inclined to think that a double offence is stated in this information, though I desire not to be understood as giving any definite opinion upon the point. Sect. 4 begins, "Every officer, clerk, and agent in attendance at a polling-station shall maintain and aid in maintaining the secrecy of the voting in such station." That seems to refer to the actual voting, and is something different from what follows, "and shall not communicate, except for some purpose authorized by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any voter who has or has not applied for a ballot-paper or voted at that station," &c. That seems to me to have nothing to do with maintaining the secrecy of the voting in the station. The word "but" in the information is a copulative conjunction. It really seems to me to indicate the commission of two distinct offences. I found my judgment in favour of the respondent, however, upon the third question submitted to us by the magistrate. It seems to me the offence against that part of the section which prohibits the communication of information is not committed unless the alleged offender actually makes known the information to another person, and that it is not enough that he merely gives him the means of acquiring it. The facts here set out are consistent with this,—that the members of the committee on seeing what the book was shut it up and declined to look into it. It may be said that this is a very inconvenient way of construing the Act; and it may be asked how is the offence to be proved? are you to call the persons to whom the communication is alleged to have been made? I say yes. The law makes no difference in the proof of an offence because it happens to be more or less difficult to get at the evidence. Then, shall we send the case back to be re-stated. Looking to the statement submitted to us, I am clearly of opinion that the question intended to be raised was, whether it is enough that the means of knowledge are given, or whether it must be shewn that the party availed himself of the means. I am of opinion that it is necessary to shew that the intelligence actually reached the mind of the person to whom the communication is made, and therefore that the respondent was not proved to have been guilty of the offence with which he is charged.

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(1) 29 L. J. (M.C.) 125. 6 Jur N S. 698

LOPES, J., concurred.

Judgment for the respondent.

Solicitors for appellant: *F. Venn & Son.*
Solicitor for respondent: *W. W. Wynne.*

WEST *v.* HOUGHTON.

1879
April 25.

16 Ch D 80
30 L, 31
25 Ch D

Damages—Measure of—Sporting Lease—Covenant to keep down Rabbits—Breach of—Damage to Covenantee's Tenant—Nominal Damages.

A lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would during the term keep down and destroy the rabbits on the estate, so that no appreciable damage might be done to the crops thereon. Appreciable damage was done to the crops of an occupier of the land by rabbits on the estate, but the plaintiff never was under any liability to compensate the occupier for any such damage, and paid him no sum whatever in respect thereof. In an action for breach of covenant:—

Held, that the plaintiff having suffered no damage himself, and not being in the position of a trustee for the occupier was entitled only to nominal damages.

CASE stated on appeal from the Denbigh county court.

The appellant was plaintiff and the respondent defendant in an action tried in that court.

The plaintiff claimed 50*l.* damages for breach of covenant.

The covenant was contained in a lease of sporting rights dated the 30th day of March, 1876, and made between the plaintiff of the one part and the defendant of the other part.

Copies of lease, &c., were set out in appendices, which also contained the preliminary correspondence between the defendant and the agent of the plaintiff, and an unexecuted engrossment as proposed by the agent, with the defendant's pencil alterations thereon shewn in red ink.

The admission of the correspondence and unexecuted engrossment was objected to by the plaintiff at the hearing, and formed part of the case, subject to his right to urge the objection upon the hearing of the appeal.

The covenant for the alleged breach of which this action was brought was as follows: "And shall and will during the said term keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate."

It was admitted for the purpose of the case that John Roberts, who was at the time of the action the occupier of the farm (portions of the estate in respect of which the damage was alleged to have been caused), was also tenant thereof at the time of the making of the lease of the sporting rights to the defendant, and that the defendant at the time of the making of the lease had no reason to suppose that any portion of the estate was occupied by the plaintiff personally or otherwise than by his tenants.

It is admitted for the purpose of the case that the plaintiff never was under any liability to compensate the occupier of the farm for any damage done to his crops by rabbits, and that he had in fact paid him no sum whatever in respect of such damage.

At the trial it was contended for the plaintiff that he was entitled to recover such damages as would be sufficient to compensate the occupier for the injury caused to the crops on the estate, by the defendant's breaches of covenant, on account of and for the benefit of such occupier, and as trustee for such occupier, on the ground that the covenant in question was inserted in the agreement for the benefit of the occupier and not for the personal benefit of the plaintiff, and in support of his right to sue as such trustee the case of *Robertson* v. *Wait* (1) was cited.

It was contended on the part of the defendant that the covenant did not bear the alleged construction, and that, even if a breach of covenant were proved the plaintiff was not entitled to recover more than nominal damages for breach of the covenant as he had personally sustained no damage and was under no liability to the occupier, and that he was not entitled to recover in the action on account of or as trustee for the occupier.

The judge while the plaintiff's case was proceeding intimated that in his opinion the point raised should be decided by the superior Court, and, after argument upon the facts herein stated and the admission of the defendant in the next paragraph contained, gave judgment for nominal damages, and gave the plaintiff leave to raise the point of law hereinbefore mentioned by way of this appeal to the High Court of Justice.

For the purposes of this case (but not otherwise) it was admitted that appreciable damage had been done to the crops of the occupier by rabbits on the said estate during the subsistence of the lease.

(1) 8 Ex. 299; 22 L. J. (Ex.) 209.

The question for the opinion of the Court was:—Whether the plaintiff was, under the circumstances hereinbefore set forth, entitled, under the lease of the 30th of March, 1876, and the covenant therein contained, to recover any, or (if any) more than nominal damages for the injury caused to the crops of the occupier by the defendant not having kept down and destroyed the rabbits on the estate so that no appreciable damage was done to the crops of the estate.

By the sporting lease set out in an appendix the defendant covenanted, inter alia, that he would carefully preserve the game from depredations by poachers and others and not suffer it to be diminished in quantity or value, save only by fair and ordinary sporting, and at the end of the term leave a fair and sufficient and usual number of such game, rabbits, and fowl, on the premises for the propagation and maintenance of the usual and average stock. Then followed the covenant in question, and covenants for payment by the lessee of rates and taxes and against assignment and to deliver up at the end of the term without notice to quit, and a proviso that in case of non-payment of rent, or wilful breach of the provisions of the lease, the plaintiff might determine the term thereby granted by notice addressed to the defendant at his last known place of abode in England without prejudice to his liability to pay all rent then due, or which should become due for the then current year.

McIntyre, Q.C., and *McIntyre,* for the plaintiff. The covenant is precise and the breach admitted. The measure of damages is the value of the crops injured by the breach. The plaintiff is in the position of a trustee for the occupier whose crops were damaged. In *Robertson* v. *Wait* (1) a charterparty contained a stipulation that the vessel was to be consigned to Ewins & Co., on the usual terms, one of which was, that Ewins & Co. might procure the homeward freight at a commission. The charterers having agreed with Ewins & Co. for a share in the commission, brought an action against the defendants for a breach of this stipulation, but failed to prove in what proportion the commission was to be divided. The Court of Exchequer held that as the clause was inserted for the benefit of Ewins & Co., the plaintiffs were entitled to recover as trustees on their behalf, notwithstanding they failed to shew their interest in the commission. "If," said Martin, B. (1), "a person makes a contract whereby another obtains a benefit, why may not the former sue for it?" and Parke, B., asked "What is the object of inserting the particular clause in the charterparty, except for the benefit of Ewins & Co., and in order that they may receive the homeward freight?" adding, "Therefore, in that respect the contract was made on their behalf."

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(1) 8 Ex. 299; 22 L. J. (Ex.) 209.

[LORD COLERIDGE, C.J. There Ewins & Co. were expressly named in the contract.]

But were not parties to it. That the occupier is not named in the present covenant makes no difference; the stipulation was inserted for his benefit. He was then and is still the occupier of the land.

[LORD COLERIDGE, C.J. How could the occupier get the damages if recovered out of the pocket of his landlord?]

By an action for money had and received, or in Chancery.

W. R. Kennedy, for the defendant. The plaintiff is only entitled to nominal damages, for he has suffered no damage.

[DENMAN, J. It seems rather improbable that an express covenant should be made to secure only nominal damages.]

The landlord protected himself against damage by retaining a power of giving notice and determining the lease if the covenant were broken. It is evident from the terms of the lease that the parties intended that the game should be kept up. The earlier correspondence shews it. The plaintiff seeks to construe the lease as an undertaking to compensate the tenant for damage to crops. A covenant to that effect is common in such leases, but has been purposely omitted from this lease. No authority can be cited to support such an action by a trustee for a cestui que trust, where there is neither a liability to pay over the sum sued for, nor any sum paid; *Robertson* v. *Wait* (2) is not an authority, for there Ewins & Co. were expressly included in the terms of the charter, and the charterers were taking an interest in the commission, although the evidence of the agreement to

(1) 8 Ex. 299, at p. 301.

(2) 8 Ex. 299; 22 L. J. (Ex.) 209.

divide it being in writing, and not produced, was rejected. In this sporting lease neither Roberts nor any class of persons, amongst whom he might be included, is named. He did not enter the farm on the faith of the covenant in the sporting lease. He was in before. The landlord has not compensated him for the appreciable damage to his crops, and is under no liability to do so. Damages paid to the landlord could not be recovered from him by the occupier.

McIntyre, Q.C., replied. The intention of the parties must be ascertained from the lease alone.

Lord Coleridge, C.J. I am of opinion that the proper measure of damages in this case is the damage done to the covenantee, which is merely nominal. The object of the plaintiff in making the covenant was, doubtless, to protect his tenant, and there are well known forms of language whereby that object might have been attained. But the parties have used language to which the effect contended for on behalf of the plaintiff could only be given by doing violence to the ordinary rules of construction. A lease is made between the plaintiff and defendant, and the sporting rights of the plaintiff over his estate are demised for a certain term to the defendant. One of the covenants in this lease is that the lessee "shall and will during the said term keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate." We are to take it as a fact that this has not been done; and we are also to take it as a fact that the tenant has no right to compensation from his landlord for any damage which he, the tenant, may sustain from the excessive use of the sporting rights by the defendant keeping up too much game; and that no money has been paid by the landlord to the tenant as compensation. It has been argued that, nevertheless, the true measure of damage is the damage which would have accrued to the tenant in the original lease, who is no party to the sporting lease, and who, neither under the sporting lease nor the original lease has any legal claim whatever against his landlord—in terms. Of course he could have none under the original lease which is silent as to compensation. But it is said, and it was necessary to contend, that under the sporting lease he has such right by the true effect of the covenant, that the landlord has a right to recover the damage to the tenant as trustee for the tenant, and that the damage so recovered would be recovered for his cestui que trust. I asked in vain during the argument how, supposing the plaintiff recovered 50*l.* and got it from the sporting lessee, the tenant could get it out of his landlord's pocket; an action for money had and received, or proceedings in Chancery could only lie on the ground that the law or the words in this covenant constituted the landlord a trustee for the tenant in respect of such damages; but, if so, the cestui que trust, by ways and means known to the law, could compel the trustee to sue for his benefit. How would it be possible, on the words of this lease, to contend that the tenant could compel the landlord, if the landlord were unwilling, to bring an action for the breach of this covenant? It appears to me perfectly clear that it was a matter between the covenantor and covenantee, and that, inasmuch as the covenantee only is able to sue, all that he can recover is the damage to himself. Mr. Kennedy pointed out in his interesting and clever argument that this conclusion does not at all reduce the covenant to a nullity, because there is a proviso by which the lessor retains a right to turn the sporting lessee out for breach of covenants, and, inter alia, for breach of this covenant. Moreover, if in defiance of remonstrance, the sporting lessee persisted in breaking the covenant, the lessor could by injunction restrain it. So there would be ample protection for the rights of his tenant. That is clear. The only case cited is, for the reasons given in argument, not in point. I entirely agree with the decision and reasons given for it in *Robertson* v. *Wait* (1); there Ewins & Co. were named in a charterparty as the persons who were by the terms of it to collect the freight; the plaintiff agreed that Ewins & Co. should procure homeward freights on certain conditions, and that commission should be divided in certain proportions between them. So the plaintiff had a right to sue for that freight partly as trustee for Ewins & Co. who were interested in it to a certain extent, and partly for themselves. I should willingly submit to that case, if in point. But it is not. Because here, in the first place, there

(1) 8 Ex. 299; 22 L. J. (Ex.) 209.

1879

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is no one mentioned as the object of the covenant except the covenantee; and secondly, in *Robertson* v. *Wait* (1), the person standing in the position of covenantee had a direct and important interest in bringing the action, and so, as he had that interest, and, as to the rest, was trustee for the person named, the action was properly held to lie.

DENMAN, J. I am of the same opinion. I think we ought to decide this case wholly without reference to the other documents set out in the appendices, and that it turns on the meaning of the lease of sporting rights; and I do not found my judgment on the other documents. But having regard to the lease itself and to the facts stated in the case, I am of opinion that the judgment for only nominal damages was right. It has been contended that the plaintiff was entitled to more than nominal damages, there having been appreciable damage done by rabbits on the estate, and that he was entitled to sue as trustee for the occupier of the land. I am of opinion that is not so, on the short ground that there was no evidence here of any trust between him and the occupier at the time of entering into the covenant. I think for the reasons given by my Lord that *Robertson* v. *Wait* (1) is quite different and does not apply, and that, as the damage here was nil, the judgment for merely nominal damages was right and ought to stand.

Judgment affirmed.

Solicitors for plaintiff: *Dean & Taylor.*
Solicitors for defendant: *Harvey, Alsop, & Stevens.*

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(1) 8 Ex. 299; 22 L. J. (Ex.) 209.

1879
April 27.

THE YORKSHIRE BANKING COMPANY *v.* BEATSON AND MYCOCK (1).
THE LEEDS AND COUNTY BANKING COMPANY *v.* BEATSON AND MYCOCK.

Partnership — Style of — Name of Individual Member — Signature to Bill of Exchange—Liability of Firm—Evidence.

If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm.

Aff'd on appl 5 C.P.D. 109 C.A.

ACTIONS upon bills of exchange.

The causes were tried before Lindley, J., at Leeds, during the last autumn assizes.

The jury found verdicts for the plaintiffs. A rule nisi to set them aside and for a new trial was afterwards obtained and argued.

The proceedings, facts, and arguments sufficiently appear in the judgment of the Court.

Dec. 5, 1878. *Digby Seymour, Q.C.*, and *Tindal Atkinson*, for the plaintiffs, shewed cause.

Waddy, Q.C., and *Gainsford Bruce*, for the defendant Beatson, in support of the rule.

In addition to cases cited in the judgment, the following authorities were referred to: *Cox* v. *Hickman* (1); *In re Agriculturist Cattle Insurance Company, Baird's Case* (2); Pollock on Partnership, pp. 24, 25; *Kirk* v. *Blurton* (3); *Shirreff* v. *Wilks* (4); *Lloyd* v. *Ashby.* (5)

April 27, 1879. DENMAN, J., delivered the judgment of the Court (Denman and Lopes, JJ).

In these two actions, the second of which was to abide the event of the first, the plaintiffs were the holders of bills of exchange. Beatson had allowed judgment to go by default; the question was whether Mycock was liable as Beatson's partner.

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(1) 8 H. L. C. 268; 30 L. J. (C.P.) 125. 7 Jur. N.S. 105

(2) Law Rep. 5 Ch. 725.

(3) 9 M. & W. 284.

(4) 1 East, 48.

(5) 2 B. & Ad. 23.

S.C. post on appl 213

The first action was brought upon two bills, one for 276*l.* 15*s.* at four months, dated the 6th of March, 1878, drawn by one Kelly on one Wilson, and indorsed "William Beatson;" the other for 484*l.* 13*s.* at four months, dated the 13th of March, drawn by one Carr, addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson." The bills were discounted by the plaintiffs on the 14th and 18th of March respectively. It appeared that these bills were renewals of earlier bills originating in accommodation transactions between the defendants Beatson, and Carr, Kelly, and Wilson; and that the bills were accepted and indorsed by Beatson without the knowledge of Mycock. Before January, 1878, Beatson had carried on the business of a chemical manufacturer at Rotherham. On the 1st of January the two defendants entered into partnership in the said business, on the terms that the style of the firm was to be "William Beatson," that the defendant Beatson should have the whole management of the business, and that neither partner should have authority to draw, indorse, or accept bills without the previous consent in writing of the other. The plaintiffs never heard of the existence of any partnership until long after the discount of the bills, viz., on the 17th of July, and knew nothing of Mycock until then. Beatson had kept an account at the Sheffield and Rotherham Bank for fifteen years. After the formation of the partnership no change was made, either in the heading of his account at the bank or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The proceeds of the bills went into this account, and Beatson drew on this account from time to time to pay for goods supplied to the business, but his account with the bank was overdrawn, and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question.

It appears to us that the liability or non-liability of the defendant Mycock in this case must turn mainly on the question whether, when the name of a firm is identical with that of an individual member of it, and that individual member accepts or indorses bills of exchange directed to or indorsed by him in his own name, being also that of the firm, these are to be taken to be primâ facie the bills of the firm, or the bills of the individual member; in other words, on whom is the burden of proof? On the plaintiff to shew that the bill is one which the individual member had authority to draw so as to bind the firm; or on the defendant to shew the contrary?

In the case now under consideration the learned judge put two questions to the jury, first: "Was the name William Beatson put to the bills to denote the firm or to denote William Beatson only?" and, secondly, "Did the bank take the bills as the bills of the chemical works, whoever their proprietors might be, or as the bills of Williams Beatson only?"

The jury found as follows: "The bill dated the 13th of March having been drawn by Josiah Carr & Son upon William Beatson, at the address, Chemical Works, Rotherham, we agree that William Beatson's acceptance of it must be held to denote the acceptance of the firm. The bill dated the 6th of March gives no evidence upon the point put by the judge."

If the case turned upon whether these findings were satisfactory or not, for the purpose of giving judgment we should be of opinion that they were not, and that, even if there was evidence which required to be submitted to a jury at all in the case, there must have been a new trial. The reasons given by the jury shew that they were not answering the questions put to them by the learned judge, but rather laying down the proposition that Carr addressing the bill to Beatson at the works, and the bill being accepted by him, was evidence that it was a bill intended to be addressed to the firm, and therefore binding upon the firm. The bill was in fact addressed to "Mr. William Beatson, Chemical Works, Rotherham," which was his residence; and we think that this mode of addressing the bill is really no evidence at all, as against Mycock, that the bill was a bill of the firm, or one which the plaintiffs had any ground for considering to be a bill binding on any one but William Beatson personally. The jury being asked afterwards what they said as to the bill of the 13th of March, said that "from the fact of its being put in connection with the other they supposed it must follow the same result."

Both sides contended that it was not necessary to have left any questions to the jury at all, Mr. Seymour for the plaintiffs, urging that because "William Beatson" was the firm's name, and the defendant Mycock a sleeping partner in a firm of that name, he was liable as in an ordinary case of partnership with an ordinary firm's name, such as "A. & Co.," or "A. & B.," or "A. B. & Co.," Mr. Waddy for the defendant, on the other hand, contending that "William Beatson" was primâ facie the name of the man William Beatson, and that it lay on the plaintiffs to establish that a bill accepted or indorsed by him in that name was a bill of the firm and not of the individual. The rule was granted on the ground that the learned judge was wrong in leaving the questions he left to the jury, and that the verdict was against the evidence. But it was also contended upon the argument for the defendant Mycock that he ought to have judgment upon the ground that there was no evidence at all which could properly have been left to the jury in support of his liability, and that upon the undisputed facts the judgment ought to have been entered for him. Several authorities were cited on both sides which we propose briefly to consider.

The question is stated as follows in the 12th ed. of Byles on Bills, p. 48. "If a man be at the same time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both, it has been held that an indorsee may charge either firm at his election. *But* where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, *perhaps* the firm is not pledged."

In *Wintle* v. *Crowther* (1), Bayley, B., draws a distinction between the case where a partnership name is pledged, and the case of *Ex parte Bolitho* (2) in which a joint and separate trade was carried on in the name of the same individual. In the latter case it was held that the firm was not liable unless it could be shewn that the bill was drawn as a bill of the firm, and not as a bill of the individual only. On the other hand, in the case of *Furze* v. *Sharwood* (3), where the defendants were trustees to carry on the business of an embarrassed firm, A. M. & K., in the name of M. alone, and they employed M. to carry on the business, it was held, under the particular circumstances of the case, that the indorsements of certain bills indorsed by M. in his own name were primâ facie the indorsements of the defendants, and that the onus of shewing that the indorsements were made on account of the separate business and not on that of the trustees, which was the general and ostensible business, was on the defendants. The Court, however, in that case lay stress upon the fact that the bills were discounted with persons who were in the habit of discounting for the firm who had assigned their effects to the defendants, and said that the cases cited (*Ex parte Bolitho* (1) included) were not inconsistent with the view they took of the case under consideration; so that we think that case can hardly be regarded as laying down that in every case the onus is upon the defendants, where a bill is drawn by a person whose name is the same as that of the firm to which they belong, to shew that the bill is not the bill of the firm. In the present case the only evidence, beyond the bill itself, given to shew whether it was a bill intended to bind the firm was the evidence of Beatson himself who swore that he did not so intend; that the bills in question were not signed by him in respect of any trade transactions, but accommodation bills, never brought into any partnership book or account. Of course it was competent to the jury to disbelieve Beatson, but, unless the onus of proof lay upon the defendants, we think there was no evidence upon which the jury could have found properly for the plaintiffs upon that question, and nothing which could have been properly put to the jury as evidence to contradict Beatson in that respect. The only evidence relied upon by the plaintiffs for the purpose, was the fact that Beatson had paid the proceeds of the bills into the account kept in his name at the bank; but inasmuch as that account was always overdrawn so far as he was concerned, but so far as the business was concerned there was always a balance in hand, we do not think that his improper conduct in raising money on bills for his own purposes in his own name can properly be held to have had the effect of binding the partnership, or to amount to evidence that the bills were accepted or indorsed for the purposes of the firm.

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(1) 1 C. & J. 316, at p. 318.

(2) 1 Buck. 100.

(3) 2 Q. B. 388.

Many other authorities were cited from the English reports;

(1) 1 Buck. 100.

none exactly in point, but bearing more or less upon the question whether in such a case as the present the presumption is in favour of or against the liability of the dormant partner.

In *Emly* v. *Lye* (1), where one of two partners drew bills in his own name, which he procured to be discounted by a banker through the same agent who had procured the discount by the same banker of bills drawn in the name of the partnership, it was held that the banker had no remedy upon the bills so drawn, though the proceeds were carried to the partnership account, the money being advanced solely on the security of the persons whose names were on the bills, by way of discount, and not of loan to the partnership, although the bankers conceived at the time that all the bills were, in fact, drawn on the partnership account. In that case Lord Ellenborough, C.J., says, "Nothing passed from the defendants to induce the plaintiff to believe that it was a partnership concern, and to lend his money on that account." Grose, J., adds, "At the time when the discount took place, the partnership had made no contract with the discounter, who, therefore, must be taken to have purchased the bills of" the one partner only. Le Blanc, J., says: "To charge the defendants on these bills, they must appear to have been drawn for and on account of the partnership;" and Bayley, J.: "There was no contract made between the parties at the time." This case appears to us to be strong to shew that where no credit is given to a partnership on the face of the bill, the presumption of law must be that the individual signing the bill is the only person liable for it, in the absence of express proof of authority from his partners to bind the firm by bills given in his own name, as well as of the particular bill being, in fact, a bill signed for the purposes of the partnership. The case of *South Carolina Bank* v. *Case* (2), which was strongly relied upon by the plaintiffs' counsel, appears to us not to assist the plaintiffs in the present case, because there the transaction in question was in its commencement one entered into for the partnership under such circumstances as to make them liable for the dealings of the individual member. It has been doubted whether that case was rightly decided: see *Miles' Claim* (3); but it is enough to say that

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(1) 15 East, 7.

(2) 8 B. & C. 427.

(3) Law Rep. 9 Ch. 635, at p. 649.

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it turned upon the question whether the individual who signed the bills had, at the time he signed them, an authority to pledge the credit of the firm by an indorsement is his own name: see per Bayley, B., in *Smith* v. *Craven* (1); and the case was one in which the bills were not accommodation bills, as in the present case, as between the party whose signature was relied upon, and the other original parties to the bill.

In *Stephens* v. *Reynolds* (2), it was held that where A. and B. carried on business in partnership in the name of B., and A. accepted a bill in B.'s name for goods supplied to the partnership, B. was liable, though the bill was not addressed to the place where the partnership business was carried on, but to a place where he carried on a separate business. There is some difficulty in understanding the report of that case, and Bramwell, B., did not agree with the judgment pronounced, but it does not assist us, because it is clear that the main ground of the decision of the majority of judges was that the bill had been accepted for goods supplied to the firm.

The case of *Edmunds* v. *Bushell* (3) was not a case of partnership, but a partnership name was used where the whole business was the business of the defendant, so that the persons advancing money on the bills were necessarily led to suppose that they were advancing money to a collection of persons in business, or on the faith of a business being carried on, and not, as in this case, without anything to lead them to suppose that they were dealing with the individual only whose name appeared on the bills. The case of *Swan* v. *Steele* (4) is also a case in which the bills sued upon were accepted in a partnership name, properly so called, and is therefore not in point. *Vere* v. *Ashby* (5) is open to the same observation; so also is the case of *McNair* v. *Fleming* (6), cited by Lord Redesdale in 3 Dow. 229.

In the last edition of Lindley on Partnership, p. 342, the learned author lays down the law as follows: "Again, persons may carry on business in partnership in the name of one of themselves, and if they do, they will be liable on bills accepted by him in that name, *if it was in fact used to denote* all the partners: but not otherwise." This does not mean that the liability of the firm depends simply upon the question whether the person accepting has in his own mind an intention of improperly making his partner liable on bills accepted for his own accommodation. The meaning is that the firm will be bound if the bill was given for a partnership purpose, or for what purported to be a partnership purpose, and was not known to be otherwise by the person taking the bill. This statement, moreover, only applies to ordinary trading partnerships which are primâ facie bound by bills given by one partner in the name of the firm. The learned judge himself, having read this judgment, has authorized us to give this explanation of the passage in question.

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(1) 1 C. & J. 500, at p. 507.

(2) 5 H. & N. 513.

(3) Law Rep. 1 Q. B. 97.

(4) 7 East, 210.

(5) 10 B. & C. 288.

(6) 3 Dow. 229.

We think there is great force in Mr. Waddy's argument that if the mere fact that there is a partnership carried on in the name of one partner, were to make the firm liable for all bills accepted by that partner, it would be possible for him to bind his partner to an unlimited extent for all his own private debts, unless the partner could shew affirmatively facts which should disentitle the plaintiffs, who never heard of his existence, to make him liable upon the bill. It may no doubt be said that it is his own fault for allowing his partner to carry on business in his own name. But this seems to us to be no ground for making the innocent partner liable for debts incurred by the guilty partner wholly for his own purposes, and not for the benefit of the partnership, in a case where the name used in no way invites the person advancing money on the bills to consider that there is any plurality of persons undertaking the liability, and where there are no circumstances to lead that person to suppose that he is dealing with a firm.

In *Miles' Claim* (1), James, L.J., forcibly states the law as follows: "It is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill." We think that this is a true statement of the law, subject only to the qualification that in cases where a partnership is carried on in the name of an individual without a partnership style, and it is affirmatively proved that the bill in question is one executed for partnership purposes, or with the authority of the partner, the name of the individual may have the same effect as the name of a partnership or body of persons in ordinary cases has without such proof.

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(1) Law Rep. 9 Ch. 635, at p. 643.

In America it has long since been decided and uniformly held that where the name of one partner is identical with that of the firm, the burden of proof is upon the plaintiff to shew that the bill is the paper of the firm, and not of the individual partner. Parsons on Bills of Exchange, p. 131, so states the law, and it was so laid down by the Supreme Court of New York, in *Oliphant* v. *Matthews* (1), and by Story, J., in *United States Bank* v. *Binney and Others* (2), who explains the law as follows: "Where the contract is made in the name of the firm, it will primâ facie bind the firm, unless it is ultrà the business of the firm. Where the firm imports, on its face, a company, as A. B. & Co. or A. B. & C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shewn to be used for partnership objects, and as a partnership act." See also Story on Partnership, §§ 106 and 142.

We think that this is in accordance with the true principles of the law of agency, of which the law of partnership is a branch, and that the weight of English authority is in favour of the American view of the law. Mr. J. A. Russell, in the 11th ed. of Chitty on Bills, lately published by him, states, at p. 37, the law, as we think, correctly, to the same effect.

5 CPD 114

We are of opinion then that this was a case in which the plaintiffs were bound affirmatively to prove the defendant's liability on the bills in question, by proving something more than that the defendant was a partner in business with Beatson.

It is, indeed, argued on behalf of the plaintiffs that there

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(1) 16 Barb. 608, at p. 610.

(2) 5 Mason, 176, at p. 183.

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was evidence in the case of the proceeds of these bills being applied for the purposes of the firm, and of such a dealing between the defendants as that an authority might properly be inferred. If we thought this was so, we should still have thought it necessary, owing to the manner in which the questions were put and answered by the jury, to have made the rule absolute for a new trial; but for the reasons given above, we are of opinion that there was no evidence at all proper to be submitted to the jury in favour of the plaintiffs' contention. The bills were clearly accommodation bills for Beatson's benefit; there was nothing on the face of them to indicate that any but Beatson was to be bound. The only evidence given as to the intention to bind Mycock was against such intention, and there was no general or special authority to Beatson to draw bills, or evidence of a mutual intention that Mycock should be so bound.

Under these circumstances, we feel bound, under the power given to us by Order XL., rule 10, to enter judgment for the defendant Mycock with costs, and to set aside the judgment for the plaintiffs as against him.

Judgment for the defendant Mycock with costs.

Solicitors for plaintiffs: *Jacobs & Vincent.*

Solicitors for defendant Mycock: *Learoyd & Co.*

YORKSHIRE BANKING COMPANY (LIMITED) v. BEATSON AND MYCOCK. (2.)

May 12.

Practice—Order XIV., rule 6—Leave to defend—Security—Payment into Court —Judgment for Defendant—Notice of Appeal—Right to return of the Money.

If a defendant, fulfilling the condition of an order under Order XIV., rule 6, by which he was allowed to defend an action, has brought money into court, and the final judgment of a Divisional Court be afterwards entered for him, he is thereupon entitled to the return of the money, although notice of appeal against the judgment may have been given by the plaintiff.

APPEAL from Field, J., at chambers.

Partners being sued on a bill of exchange by writ specially endorsed, the defendant Mycock appeared and obtained, by an order made under Order XIV., rule 6, leave to defend on bringing 100*l.* into court. He paid that sum in. The action was tried and a verdict found for the plaintiffs, but a rule nisi for a new trial was afterwards granted upon the ground that there was no evidence of Mycock's liability, and misdirection in leaving the case against him to the jury.

The question whether the fact of the bill being signed by the defendant William Beatson in his own name, which was likewise the sole name of the partnership firm, was sufficient evidence to render the firm liable having been argued, the Divisional Court decided in favour of the defendant Mycock, and under Order XL., rule 10, directed judgment to be entered for him. (1)

On the 1st of May he took out a summons calling on the plaintiffs to shew cause why the 100*l.* should not be paid out to him, the defendant Mycock.

On the 3rd of May notice of appeal against the judgment of the Divisional Court was given by the plaintiffs.

On the 5th of May the summons was heard and dismissed by a master, and his decision affirmed by Field, J.

Waddy, Q.C., for the defendant Mycock. If there is a good primâ facie defence the condition of payment into Court ought not to be imposed: *Agra and Masterman's Bank* v. *Leighton.* (2) That the defendant had a good defence is clear. He never ought to have been compelled to pay the money in, and is now certainly entitled to have it out of court.

THE COURT called on

Tindal Atkinson, for the plaintiffs. The case cited was a decision upon the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67). But the order giving leave to defend this action on the terms of payment into court was made under Order XIV. of the Judicature Act, 1875. To get leave to defend without security a defendant must make out a clear and distinct defence. The 100*l.* was paid in to abide the final event of the action. The defendant did not appeal against the order. Proceedings are pending in the Court of Appeal, and so the event is not yet determined, and the security should remain. He referred to *Ex parte Isaacs, In re Baum* (1); *Murray* v. *Arnold.* (2)

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(1) Ante, 204.

(2) Law Rep. 2 Ex. 56.

Lord Coleridge, C.J. I think that the defendant is entitled to the order claimed. I should at once defer to the authority of the cases in Chancery and the Court of Queen's Bench if they were in point, but in neither of the cases do I find anything to change the substratum on which the order was made. In each of those cases a perfectly proper order was made, and under it the money was properly in court, and the only question was, what was to be done with the money properly there? And the decisions seem quite right. But in this case the order would never have been obtained for payment of the money if the law had then been as it now is, determined by the judgment of two judges of the High Court of Justice in the defendant's favour. Under these circumstances it is impossible to say that any judge having an affidavit before him raising the defence now held to be good, would have imposed terms on the defendant in allowing him to raise the defence. The cases shew that the true view of Order XIV. is that if there is a bonâ fide defence—not necessarily a good one and not necessarily a right one—the defendant is not liable to be put on terms. Here the defendant has raised a defence which is now established at law by the judgment of this Court, and the plaintiffs wish to dispute that formal judgment. The question is whether, in order to do so, they are entitled to keep in court the money they got into court before the decision. I think that they are not. It never was intended that the money should do more than stand as security for the trial of the issue. The present state of the case shews that there was a perfectly reasonable defence pleaded, on which the defendant has a right to have judgment. The terms of payment into court were properly imposed when they were imposed, but the situation is now different, and the question is whether, when the conditions precedent of the order for security are gone, the security ought to remain. I think not, and that the defendant is entitled to the return of his money.

Denman, J. I am of the same opinion. At the time when the

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(1) 9 Ch. D. 271.

(2) 3 B. & S. 287; 32 L. J. (Q.B.) 11.

9 Jur. N.S. [illegible]

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order was made that 100*l.* should be brought into court as a condition of the leave to defend, it was, at least, a very difficult question whether the defence could prevail. But, the case having been elaborately argued, two judges have upheld the defence and given judgment for the defendant. He applies for his money remaining in court. I think we must consider that the question of law, which was doubtful when the terms of payment into court were imposed on him, is now determined in his favour; that every purpose for which the money was paid into court has been fulfilled; and that it never was intended that the money should remain in court, after a decision of the High Court, in order that hereafter, if the plaintiffs should succeed on appeal, they may have the benefit of the security. Therefore, as the 100*l.* would never have been ordered to be paid under such circumstances as now exist, I think the defendant is entitled to an order for it to be paid out.

Order accordingly.

Solicitors for plaintiffs: *Jacobs & Vincent.*

Solicitors for defendant Mycock: *Learoyd, Learoyd, & Pease.*

May 2.

MORTEO and Another, Appellants; *v.* JULIAN, Respondent.

Ship and Shipping—Pilotage Dues—Allowance to Pilot carried beyond Limits of his Licence—Liability of Shipbrokers—17 & 18 *Vict.* c. 104 (*The Merchant Shipping Act*, 1854), *s.* 357.

The ten shillings and sixpence per day to which a licensed pilot, taken, without his consent, to sea or beyond the limits of his pilotage district, in any ship, is entitled by 17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854), s. 357, are not "pilotage dues" for which the shipbrokers are liable under s. 363.

Case stated by Justices for the Borough of Cardiff under 20 & 21 Vict. c. 43.

The appellants were shipbrokers at Cardiff, and the respondent was a Bristol Channel pilot.

In December, 1878, the master of the Genoese vessel *Voltre* being about to proceed with the vessel from Cardiff to Genoa, employed the respondent to pilot the *Voltre* from Cardiff Docks as far as Lundy Island. The respondent piloted the vessel first from Cardiff to Penarth Roads and thence as far as Lundy Island. The respondent did not leave the *Voltre* when she arrived off Lundy Island, which is the extremity of the limits of the British Channel pilotage district, but the master of the *Voltre*, against the will of the respondent, took him to sea beyond such limits, and eventually landed him at Genoa, in Italy. At Genoa the master of the *Voltre* paid the respondent the pilotage dues for piloting the *Voltre* from Cardiff outwards to Lundy Island, and also paid him a reasonable sum for his travelling expenses from Genoa back to Cardiff.

The respondent claimed from the master of the *Voltre* when at Genoa, compensation for his detention on board the vessel from the time she passed Lundy Island until his arrival back at Cardiff, but this he was not paid.

The appellants acted as brokers for the *Voltre* when she was at Cardiff, in December, and they paid the pilotage inwards and the vessel's dock dues incurred at Cardiff.

The time which elapsed from the time the vessel left Lundy Island as aforesaid, until the respondent returned to Cardiff from Genoa was fifty-two days. The respondent instituted proceedings before the justices of Cardiff, and claimed an allowance for the fifty-two days under the provisions of s. 357 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (1), 27*l.* 6*s.*, being at the rate of ten shillings and sixpence per day.

(1) 17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854), Part V., s. 357: "No pilot, except under circumstances of unavoidable necessity, shall without his consent be taken to sea, or beyond the limits for which he is licensed, in any ship whatever; and every pilot so taken under circumstances of unavoidable necessity or without his consent, shall be entitled, over and above his pilotage, to the sum of ten shillings and sixpence a day, to be computed from and inclusive of the day on which such ship passes the limit to which he was engaged to pilot her up to and inclusive of the day of his being returned in the said ship to the place where he was taken on board, or up to and inclusive of such day as will allow him, if discharged from the ship, sufficient time to return thereto; and in such last-mentioned case he shall be entitled to his reasonable travelling expenses."

Sect. 363: "The following persons shall be liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained; (that is to say,) the owner or master, or such consignees or agents thereof as have paid or made themselves liable to pay any other charge on account of such ship in the port of her arrival or discharge, as to pilotage inwards, and

The respondent claimed under sect. 363 of the Act, and had given the notice required by that section.

It was submitted for the appellants that the allowance claimed by the respondent was in the nature of compensation due to the pilot for the fifty-two days during which he was detained outside his pilotage district not acting as pilot, and that this and his reasonable travelling expenses, though recoverable from the master and owners of the *Voltre* under s. 357 of the Act, were not recoverable from the appellants (under s. 363 of the Act), and that the appellants were only liable under the provisions of s. 363 of the Act for pilotage outwards from Cardiff to the extremity of the Bristol Channel pilotage district.

The justices being of opinion that the allowance was of the nature of pilotage dues, and that the same remedy was intended by the Act to be given to the pilot for the recovery of both, made an order for the payment by the appellants of the amount claimed.

The question for the opinion of the Court was, whether the allowance for detention was recoverable in the same manner as pilotage dues under s. 363, against the agents of the ship.

Clarkson, for the appellants. The sums which the pilot may be entitled under 17 & 18 Vict. c. 104, s. 357, to claim from the shipowners are compensation for his detention; they are not due for pilotage, and therefore are not "pilotage dues" which can be recovered from the brokers under s. 363.

[THE COURT called on]

Milward, Q.C., for the respondent. "Pilotage" is the subject and title of Part V. of the Act, and the group of sections in question are headed "Rights, Privileges, and Remuneration of Pilots." Having imposed duties on the pilot, the legislature

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in the port from which she clears out, as to pilotage outwards; and in default of payment such pilotage dues may be recovered in the same manner as penalties of the like amount may be recovered by virtue of this Act; but such recovery shall not take place until a previous demand thereof has been made in writing, and the dues demanded have remained unpaid for seven days after the time of such demand being made."

By s. 518, penalties not exceeding 100*l.* are recoverable by summary proceedings before two or more justices.

then gave him rights, and by s. 357 enacted that if, in the performance of his duties, he is carried out to sea, he shall be entitled to a certain sum per day. This payment is of the same kind as that for outward pilotage. The brokers voluntarily undertake it, with the other liabilities of the ship, and it is fairly comprised in the "pilotage dues" which they may have to pay under s. 363. "Pilotage dues" means more than mere rates for pilotage.

[DENMAN, J. Is the allowance for detention a payment for "pilotage services?"]

Not strictly so. It would be a hardship that the pilot, who is compelled to go to sea, should be practically left without remedy for his compensation, as he would be if put ashore on some wild coast; and it would be at least inconvenient if he had to sue shipowners even in a foreign port of a civilized country for moneys due to him which could not be exactly estimated until his return. The legislature evidently contemplated that the brokers should be liable for all.

DENMAN, J. I think that the magistrates have put too wide a construction on the words "pilotage dues." They seem to have doubted whether the matter in question was wholly within the Act, but thought that the services were in the nature of "pilotage dues," and that they might stretch the interpretation of those words to include them. I do not think we may so expand the meaning of the words. Our reading of the Act is that the words "pilotage dues" do not include the charge of 10*s.* 6*d.* a day for carrying the pilot beyond his pilotage district. The case lies in a small compass, but I will consider the clauses one by one. In the first place, there is a certain rate payable, according to the law of the particular port, to the pilot for pilotage in certain parts of the sea. If he is carried on, then s. 357 applies. That section does not declare that the pilot shall be entitled to this payment as "pilotage dues," or term it pilotage dues, but describes it as a sum to which the pilot may become entitled "over and above his pilotage," which I take to mean his pilotage due, or the sum he shall be entitled to for his pilotage. Again, s. 358 imposes a penalty on any qualified pilot demanding, and master paying, any other rate in respect of "pilotage services." I asked Mr. Milward if the allowance in question was for "pilotage services," and he admitted that it did not come within those words, because it is not for a service, or something done in the course of service. Then s. 363 defines the persons liable to pay "pilotage dues" for any ship, viz., the owner or master, or such consignee or agents thereof as have paid or made themselves liable to pay any other charge on account of such ship in the port of her arrival or discharge, as to pilotage inwards, and in the port from which she clears out, as to pilotage outwards. Looking at the probabilities of the case, I do not think it probable that the legislature should have intended to make the brokers of a ship liable to a payment of this sort, which is wholly indefinite, and is not ordinarily contemplated as one of the disbursements of the ship. It is quite uncertain, and in the majority of cases does not occur. Moreover, it might amount to a very large sum if the pilot were carried a long distance away—a sum so large as even to exceed the moneys which pass through the hands of the brokers, and they might therefore be personally out of pocket if they paid it. There is no provision enabling the broker to recover the sum from the shipowner, unless it comes within the words in dispute. Another reason is that by s. 380 and following clauses, the phrase pilotage dues is frequently used to mean rates of pilotage. True, these sections relate to Trinity House pilots, but they shew the sense in which the words are used in the Act. I am, therefore, unable to come to the conclusion at which the Justices arrived, and I think that the respondent was not entitled to recover this compensation from the brokers, and that the judgment ought to have been against him.

LINDLEY, J. I am of the same opinion. The Act throws on persons who do not themselves employ or contract with the pilot the duty of paying for certain things, and it lays on the person who wishes to make the brokers liable the onus of proving their liability. The question is, what meaning should be given to the words "pilotage dues" in s. 363? Primâ facie they would mean money payable for pilotage services, and if we look further into the Act we find expressions tending to shew that "pilotage dues" mean the same as "pilotage rates," more especially s. 333, sub-s. 5, and s. 350, and throughout all that group of sections headed "Rates of Pilotage," speaking throughout of pilotage dues, and treating the words rates and dues as synonymous.

True, the pilot is by s. 357 entitled to a certain sum for detention, but it is not included in the phrases pilotage rates, or pilotage dues. I think, on the contrary, that the language of the section shews the sum to be something over and above his pilotage. We cannot construe it in another sense, although I feel the force of Mr. Milward's argument as to the desirability of having some one in this country to pay the pilot who has been carried beyond his limits.

Judgment for the appellants; leave to appeal.

Solicitors for appellant: *Ingledew, Ince, & Greening.*
Solicitors for respondent: *Williamson, Hill, & Co.*

BELMONTE AND OTHERS v. AYNARD AND ANOTHER.
PAUL GÜTSCHOW AND E. FORD (TRUSTEE), CLAIMANTS.

May 19.

Practice—Plaintiff in Interpleader—Claimants residing Abroad—Nominal Plaintiff—Security for Costs—Order LV., r. 2.

Where a litigant who resides abroad is for mere convenience made plaintiff in an interpleader issue, but does not substantially occupy the position of the plaintiff commencing an action, he will not be ordered to give security for costs.

Affd on appeal post. 352. C.A.

MOTION, referred from chambers, for an order that the plaintiffs should give security for costs.

In May, 1877, Paul Gütschow, residing and trading at Yokohama, in Japan, consigned bales of silk to Aynard & Rüffer, merchants in London, they having agreed to make advances on the bales to the extent of 90 per cent. of their value. Aynard & Rüffer having made the advances, and deeming themselves insufficiently secured, owing to a fall in the market price of silk, applied to F. Gütschow, a merchant residing at Hamburgh, who was the representative, in Europe, of Gütschow of Japan, for further security to cover advances made. Thereupon F. Gütschow sent to Aynard & Rüffer bills to the amount of about 1200*l*. as additional security.

In 1878, the market price for silks having improved, the silk was sold by Aynard & Rüffer, and realised enough to leave a balance of 962*l.* 10*s.* in their hands upon the amount obtained by the sale of the silks and the proceeds of the bill beyond the amount of the advances.

Meanwhile Donner & Brehmer, merchants, carrying on business in the City of London, to whom F. Gütschow, of Hamburg, was previously indebted in a sum exceeding such balance, upon a dishonoured acceptance, had in December, 1877, attached in the hands of Aynard & Rüffer all moneys and goods belonging to F. Gütschow, of Hamburgh, and commenced an action of attachment against them as garnishees in the Lord Mayor's Court. Donner & Brehmer afterwards went into liquidation, and E. Ford, their trustee in liquidation, continued the action in their name. F. Gütschow, of Hamburgh, subsequently went into liquidation, and his trustees, Belmonte and others, the present plaintiffs, about January, 1879, commenced an action in the Common Pleas Division against Aynard & Rüffer to recover the balance of 962*l.* 10*s.*

Paul Gütschow, of Japan, also claimed the balance, as being the consignor of the goods.

Belmonte and others (F. Gütschow's trustees) all resided at Hamburgh, beyond the jurisdiction of the Court. E. Ford and Donner & Brehmer resided within the jurisdiction. Aynard & Rüffer entered an appearance in the action in the Common Pleas Division, and the plaintiffs, Belmonte and others, were ordered to give security for costs.

Aynard & Rüffer then took out an interpleader summons, upon which an order was made at chambers, directing an issue to be tried, in which Belmonte and others were to be plaintiffs and Paul Gütschow and E. Ford severally defendants, to determine the rights of the respective parties to this balance of 962*l.* 10*s.*, and staying the proceedings in attachment in the meanwhile. E. Ford thereupon took out a summons calling upon the plaintiffs to give security for costs. The Master made no order, and on appeal, Manisty, J., referred the matter to the Court.

Lamaison, for the defendant Ford, in support of the motion. The plaintiffs reside out of the jurisdiction, and should therefore be ordered to give security for costs. The claimant who is made a defendant under an interpleader rule stands in the same position as any other defendant, and is consequently entitled to security for costs as in other cases: 2 Chitty's Archbold's Practice, 12th ed., p. 1400; *Benazech* v. *Bessett.*(1) In *Williams* v. *Crosling* (2) the defendant in an interpleader resided out of the jurisdiction, and was made to give security. The courts of common law have always had the power of directing substantial security to be given where the plaintiff is a foreigner out of the jurisdiction, and the Chancery practice, by which the amount of security was limited to 100*l.*, is now assimilated to that of the common law: *Republic of Costa Rica* v. *Erlanger.* (3)

R. V. Williams, for the plaintiffs. No case can be cited where security for costs has been ordered against a person who is in possession of the subject-matter of litigation. Although the trustees of the Hamburgh firm have, for the sake of convenience, been made plaintiffs in form, they are not in substance the plaintiffs, and it is the real and not the nominal plaintiffs who, when they reside abroad, are liable to give security for costs. In *Benazech* v. *Bessett* (1) the plaintiff was so not merely in form but in substance. In *Williams* v. *Crosling* (2) the defendant was made to give security because he, as execution creditor, was virtually plaintiff. "Where the defendant is quasi a plaintiff, as in replevin, and he resides abroad, he may be compelled to find security for costs. So he may be compelled to do so in a feigned issue under the Interpleader Act:" 2 Chitty's Archbold's Practice, 12th ed. p. 1416, citing those authorities for the proposition which shews the true principle on which security for costs is ordered.

DENMAN, J. The only question is whether Belmonte, the trustee in liquidation abroad of the firm at Hamburgh, is bound to give security for costs in favour of Ford, who claims security. I think the principle on which security for costs is ordered is clearly this, viz., that one who is substantially in the position of plaintiff initiating an action, and is a foreigner residing abroad, shall be bound to give security for costs; and if Belmonte occupied that position as between himself and Ford, we should as a matter of course order him to give security. It is, however, admitted on both sides that he is put in the position of plaintiff as against Ford simply for convenience of the proceedings, but in no sense, I think, can it fairly be said that he occupies the position of a plaintiff suing here, being a foreigner residing abroad. Mr. Lamaison has called our attention to several authorities, and invited us to say that they are in his favour. But I think the ratio decidendi is that the Court, in considering a question of the present kind, will see whether the party against whom security is claimed really is in the position of plaintiff or not. In some cases he is so, although he may be called defendant, and may come into the case in an unusual and anomalous way. I think *Benazech* v. *Bessett* (1) quite distinguishable. Bessett claimed to be entitled to the wines, and was substituted for the defendant under the interpleader rule. But in substance the party there claiming was really the plaintiff, and not the defendant. The other case, which also was unusual and anomalous, was one in which the party ordered to give security was the party carrying on the litigation, and in the position of suitor or plaintiff in the sense of having initiated the proceedings. So here, I think it clear that Ford is the person attacking Belmonte, and in the position of plaintiff against him, and not Belmonte who is the plaintiff against Ford.

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(1) 1 C. B. 313; 2 D. & L. 801.

(2) 3 C. B. 957.

(3) 3 Ch. D. 62.

There is another case in which it has been held that the defendant is bound to give security if he be a foreigner residing abroad, viz., in replevin, and that is on the principle that the defendant in replevin is practically the plaintiff. He is the party for whom the proceedings are taken. He is the party initiating the proceedings and carrying on the litigation. So, regarding that as the principle, I think Ford, if he was living abroad, might—whatever his nominal position—be called on to give security. But Belmonte occupies an exactly contrary position, and we should be practically ordering the defendant to give security, instead of the plaintiff, if we made the order.

LINDLEY, J. I am of the same opinion. I think we should, in the first place, look at the merits of the case to see which of the parties is the real plaintiff and real defendant, and that the mere accident that one happens to be named plaintiff in the interpleader proceedings is not conclusive. There were several illustrations of this in the old Chancery practice, for the rule was precisely the same as the rule of law; but, at the same time, if the defendant in a suit filed a cross-bill and became plaintiff, he did not give security, because his claim was looked on as a matter of defence. So, if the plaintiff filed a bill to restrain an action at law, it was looked upon as a matter of practical defence, and he did not give security simply because he was plaintiff. Here the Hamburgh firm are, in substance, sued by Ford for a debt.

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(1) 1 C. B. 313; 2 D. & L. 801.

Now that makes Ford, in effect, plaintiff as between these two, and although it is very true that Ford and the Yokohama firm have been substituted as defendants, it does not alter the substance of the case or bring it within the decision in *Benazech* v. *Besset.* (1) There the original plaintiff remained the real plaintiff, and the Court only held that the person substituted for the original defendant had a right to call on the plaintiff for security; the view we take of the case does not conflict with that. Although in form Ford is defendant, in substance he is plaintiff, and in the same position as if he were plaintiff.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Ashurst, Morris, & Co.*

Solicitors for defendants: *Saunders, Hawksford, & Bennett.*

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(1) 1 C. B. 313; 2 D. & L. 801.

1879
April 8.

BURKE *v.* ROONEY.

Practice—Extension of Time limited by the Order of a Judge or Master for doing an Act—Order LIV, r. 4, and Order LVII, r. 6—Consolidation of Actions.

4 CPD 403.
App Cas 689
QBD 117/120

By the combined operation of Order LIV, r. 4, and Order LVII, r. 6, the Court or a judge has power to enlarge the time limited by an order of a master for doing an act, even after the expiration of the time so limited and the lapse of the four days' time for appealing, where the justice of the case requires it.

On the 25th of March a master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day; but, on the day following, a summons was taken out "for further time to answer the interrogatories:"—

Held, that it was still competent to the Court or a judge to enlarge the time for moving to set aside or vary the order of the 26th of March.

Whistler v. *Hancock* (3 Q. B. D. 83) and *Wallis* v. *Hepburn* (3 Q. B. D. 84, n.) distinguished.

Motion on behalf of the plaintiff by way of appeal from two orders of Denman, J., at chambers.

The facts and arguments are sufficiently stated in the judgment of Lord Coleridge, C.J.

Watkin Williams, Q.C., and *R. Reid*, in support of the motion, referred to *Beddow* v. *Beddow* (1), *Whistler* v. *Hancock* (2), and *Wallis* v. *Hepburn*. (3)

Willis, Q.C., and *Moulton*, for the defendant, referred to *International Financial Society* v. *City of Moscow Gas Company* (4); *Krehl* v. *Burrell*. (5)

Lord Coleridge, C.J. The facts in this case are somewhat complicated. As I understand them, they are in substance as follows:—An action was brought by the plaintiff against the defendant in the Mayor's Court, London, to recover a sum of 783*l.* for rent due under an indenture of demise. That action was removed to this Court by certiorari, and duly proceeded to issue, and was set down for trial at Guildhall on the 27th of December last. Another action was subsequently brought by the same plaintiff against the same defendant in the Court of Queen's Bench, upon the same deed, for dilapidations; and it is in respect of the proceedings in the last-mentioned action that the question arises. There was an order for interrogatories. Business called the plaintiff, who was the person by whom the interrogatories were to be answered, to Italy. He was absent for some weeks. In the meantime there had been various orders enlarging the time for answering the interrogatories. At last,—the two actions having in the meantime been consolidated, and the Queen's Bench action having been transferred to this Division,—an order was made by Master Dodgson, not a consent order in the ordinary sense, but only in the sense of its not being opposed on the part of the plaintiff, dismissing the action unless an affidavit in answer to the interrogatories should be filed on the 31st of March, 1879. On Saturday, the 29th of March, the clerk of the plaintiff's solicitors went to chambers in order to take out a summons, not by way of appeal from the order of Master Dodgson, but to extend the time for filing the affidavit in answer. By accident, however, he arrived too late, the office being closed. On his way back, the plaintiff's solicitors' clerk met a clerk of the defendant's solicitors, and he told him of the slip he had made, whereupon (according to his affidavit) the clerk of the defendant's solicitors replied that "he would mention it to their managing clerk, and no doubt they would take no advantage of it." The clerk in question makes an affidavit denying this conversation, but in terms which do not much recommend themselves. On the next day, an application to extend the time for answering the interrogatories was made to another master, who refused to grant it, assuming that for want of an affidavit on the 31st of March, the action was at an end. That matter went before my Brother Denman, not on appeal against Master Dodgson's order, but for an extension of the time for appealing, the time for appealing having expired; and it was suggested that the action being dismissed, and four days having passed, the action was no longer an existing action. The defendant's solicitors thereupon communicated to the associate the order dismissing "the action," without saying in which action it had been obtained (1), and the officer, finding that the two actions were consolidated, struck both causes out of the list and returned the papers to the solicitors. The application now before us seeks to enlarge the time for appealing against Master Dodgson's order. The first answer which has been presented on the part of the defendant is, that we have no jurisdiction, and the cases of *Whistler* v. *Hancock* (2) and *Wallis* v. *Hepburn* (3) are relied upon. Now, whatever my opinion of those two cases might be, I do not think it would be becoming in me to decline to act upon a decision of a Court of co-ordinate jurisdiction; and, even if I thought those decisions wrong, I should still judicially act upon them. But, upon looking carefully at those two cases, it appears to me that they are not only distinguishable from that now under consideration, but that they really have no application; and, if I may venture to say so, I think they were perfectly well decided. In *Whistler* v. *Hancock* (2) a master on the 15th of December, 1877, made an order under Order XXIX, r. 1, dismissing the action for want of prosecution, unless the statement of claim were delivered within a week. On the 22nd, the plaintiff took out a summons to set aside the appearance, and this summons was dismissed on the 27th. On the 29th of December, the plaintiff delivered a notice in lieu of a statement of claim, under Order XXI, r. 4; and on the 31st he took out a summons for further time for delivering a statement of claim, upon which a master made an order on the 1st of January, 1878, giving the plaintiff a week's time. This order was set aside by Fry, J., on appeal, on the ground that the master had no jurisdiction to make it. The order of the 15th of December dismissing the action for want of prosecution was neither complied with nor appealed against. Both the judges, Lord Chief Justice Cockburn and Manisty, J., held that the taking out a summons to set aside the appearance (which could not be heard within the time limited by the order of the 15th of December) could not keep alive the action after the period when by the operation of the master's order it was defunct. This decision was followed by the Exchequer Division in *Wallis* v. *Hepburn*. (3) In *Whistler* v.

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(1) 9 Ch. D. 89.
(2) 3 Q. B. D. 83.
(3) 3 Q. B. D. 84, n.
(4) 7 Ch. D. 241.
(5) 10 Ch. D. 420.

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(1) Master Dodgson's order had in the margin the words "Second action."

(2) 3 Q. B. D. 83.

(3) 3 Q. B. D. 84, n.

Hancock (1)—I am reading from the Law Journal (2)—Cockburn, C.J., is reported to have said: "I think the learned judge was right in rescinding this order, which the master had no jurisdiction to make. If before the expiration of the time limited by the order of the 15th of December, and before the plaintiff fell under the operation of that order, he had obtained an order calling on the defendant to shew cause why the appearance should not be set aside, he might have succeeded upon the merits: but he did not do this while the action was in existence. Therefore, before he could make good any ground against the defendant's right to appear, the plaintiff himself ceased to have any right to go on with his action. In face of these circumstances, it cannot, I think, be contended that this order was good, for, the action being then dead, the master exceeded his powers in making it." In that judgment I entirely concur. The judgment of Manisty, J., is to the same purpose. He says: "The mistake made by the plaintiff was in not including in his summons to set aside the appearance of a summons to set aside the order of the 15th of December. As he did not do this, the latter took effect; and I think the learned judge at chambers was quite right in holding that the master had after that no jurisdiction to make the order which he assumed to make on the 1st of January." That puts the decision upon the governing principle which I suggested in the course of the argument. (3) Those cases are strong to shew that the learned judges would have decided here precisely as I am now deciding. Thus stands the matter upon authority. How does it stand on the general law? Order LIV, rule 4, provides that "any person affected by any order or decision of a master may appeal therefrom to a judge at chambers;" and that "such appeal shall be by summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master." Here is an order by a master affecting the plaintiff,—dismissing his action in the event of his non-compliance with a condition by a given day. Within what time was the plaintiff bound to appeal against that order? Within four days after the decision, or such further time as might be allowed by a judge or master. To make Order LIV, r. 4, conclusive against the plaintiff, some such words as these must be added,—"except where the order is for dismissing the action and four days have elapsed since the order complained of." No such words are found in the rule. Then, by Order LVII, r. 6, it is provided that "a Court or a judge shall have power to enlarge or abridge the time appointed by these rules or fixed by any order enlarging time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed." The words of that rule are equally clear: the Court or a judge may enlarge the time for appealing, upon such terms as the justice of the case may require, although the application is not made until after the expiration of the time allowed by the former rule. This is an application to enlarge the time for appealing against Master Dodgson's order of the 26th of March.

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(1) 3 Q. B. D. 83.

(2) 47 L. J. (Q.B.) 152.

(3) See also *King* v. *Davenport*, 4 Q. B. D. 402.

It has been truly said that there was no intention on the part of the plaintiff to appeal against that order when his solicitors took out the summons for further time to answer the interrogatories. The answer to that is that no such application would have been necessary if the defendant's solicitors had not taken advantage of the slip made by the plaintiff's solicitors' clerk, which after the conversation with the adverse clerk they had no reason to expect. I see no reason why we should not now enlarge the time for appealing, if satisfied that injustice would otherwise be done. We shall be doing no more than assimilating the practice under the Judicature Act to that which was familiar to us all under the old system, viz. setting aside a judgment upon terms, to prevent a gross perversion of justice. At all events, I must decline to read into Order LIV, r. 4, words to exclude the power of the Court or a judge to enlarge the time for appealing against the order to dismiss the action. The judgments of the Court of Appeal which have been referred to, viz. that of Lord Justice James in *International Finance Co.* v. *City of Moscow Insurance Co.* (1), and of Lord Justice Thesiger in *Krehl* v. *Burrell* (2), do not in any way limit our discretion in this respect. In each of those cases the Court refused to extend the time for appealing, upon grounds which must carry the assent of every reasonable mind.

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(1) 7 Ch. D. 241.

(2) 10 Ch. D. 420, 424.

This disposes of the substantial part of the case, except as to the effect of the consolidation order. One difficulty in the defendant's way arises from the form of the order of the 26th of March. It is intituled in one action only (the second), which had originally been brought in the Queen's Bench Divison; the Common Pleas action, in which all the proceedings were regular, having already been set down for trial. The defendant's solicitors, however, treated the order as one applicable to both actions, and procured both to be struck out of the list of causes: it was impossible, therefore, for him to contend that the two actions were consolidated so as to become in effect one action.

The orders of Master Gordon and of my Brother Denman must be rescinded; and the plaintiff must go before the learned judge again upon the merits. As to these, of course, I say nothing; but, upon the law, I am clearly of opinion that, notwithstanding the cases of *Whistler* v. *Hancock* (1) and *Wallis* v. *Hepburn* (2), the judge had jurisdiction to extend the time limited by the order of the 26th of March for answering the interrogatories.

GROVE, J. I am of the same opinion. The distinction is obvious between the two cases of *Whistler* v. *Hancock* (1) and *Wallis* v. *Hepburn* (2) and the present case. (3) There, the plaintiffs sought to take a step in the cause after the action had been dismissed. Here, the order was that the action should be dismissed unless an affidavit in answer to the interrogatories was filed on the 31st of March. Taking Order LIV, rule 4, and Order LVII, rule 6, together, the time referred to in the former may be extended, whether before or after that time has expired. It is suggested that the discretion given by the latter rule is not to be exercised in the case of an order dismissing an action: but I should say that that is precisely the case where there should be a larger exercise of discretion than in any other case. Then, was there sufficient ground for an extension of the time to appeal here? It appears that, on the day of the expiration of the time limited to the master's order, a clerk of the plaintiff's solicitors who had been instructed to apply for a further extension of the time arrived at judge's chambers too late for that purpose, and, on his way back, meeting a clerk of the adverse solicitors, he informed him of the fact, whereupon the latter said that no advantage would be taken of the slip. This is in a certain way denied in a counter-affidavit; but I do not think that denial amounts to an absolute contradiction of the allegation in the first affidavit. That is one reason why I think there may have been a miscarriage here. If the application had been made to him in time, the master would no doubt have extended the time for filing the answer, at all events upon terms. There was no appeal, because the plaintiff's solicitors were misled by what had passed between the two clerks. Another reason why I think there should be an extension of the time is, that the order dismissing the action is ambiguous on the face of it. The words "second action" appear in the margin; and the operative words of the order are, "I do order that *this action* be dismissed, unless, &c." The two actions having been consolidated, primâ facie I should say that both were dismissed; and the defendant has so treated it: but there was no pretence for dismissing the first action, as to which all had been rightly done. In either view, I clearly think there ought to be an extension of the time as prayed. The matter must go back to my Brother Denman at chambers, who will deal with the costs.

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(1) 3 Q. B. D. 83.

(2) 3 Q. B. D. 84, n.

(3) See also *King* v. *Davenport*, 4 Q. B. D. 402.

Lopes, J., concurred.

Rule accordingly.

Solicitors for plaintiff: *Billing & Kent.*
Solicitors for defendant: *Rooks & Co.*

[IN THE COURT OF APPEAL.]

1879
June 12.

MIGOTTI *v.* COLVILL.

Time, Computation of—Discharge of Prisoner after expiration of Sentence—Calendar Month, meaning of.

A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence takes effect.

On the 31st of October the plaintiff was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence, he was detained in custody until the 14th of December:—

Held, that the detention was lawful, for as the calendar month did not expire until the 30th of November, he was not entitled to be discharged from the second term of imprisonment until the full period of fourteen days computed from the 1st of December had expired.

Action against the governor of the Middlesex House of Correction, Coldbath Fields, for improperly and unlawfully refusing to discharge the plaintiff from custody and set him at liberty, and keeping him in prison for one day longer than the term for which he was sentenced to be imprisoned.

At the trial before Denman, J., during the Middlesex Michaelmas sittings the following facts were proved. On the 31st of October, 1876, the plaintiff had been sentenced by a metropolitan police magistrate to one calendar month's imprisonment, and to a further term of fourteen days, to commence from the expiration of the first sentence. He was received into the custody of the governor of the prison at 4.25 o'clock P.M. on the 31st of October, 1876, and was released from prison on the 14th of December, 1876, at 9 o'clock A.M.

The learned judge left the question of damages to the jury, who assessed them at 20*s.*, and he then reserved the case for further consideration.

Dec. 7, 1878. The following judgment was delivered by

Denman, J. The plaintiff had been convicted by a metropolitan police magistrate of two different assaults, and sentenced to imprisonment upon each conviction; the convictions took place

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at 11 A.M. on the 31st of October, and the commitments were drawn up in accordance with the sentences passed. For the first assault the plaintiff was sentenced to be imprisoned for one calendar month, and for the second assault fourteen days, to commence at the expiration of the imprisonment previously adjudged. He was taken into the custody of the defendant, the governor of Coldbath Fields Prison, during the afternoon of the 31st of October, and finally released at 9 A.M. on the 14th of December, having claimed to be released on the previous day.

It was contended for the plaintiff that the calendar month, the term of the first sentence, commenced at midnight on the 30th of October; so far I am of opinion that the plaintiff's contention was well founded. I can find no express authority on the point, but arguing from analogous cases, I think I ought so to hold. It has been held in many cases that as a general rule, except where it is necessary in order to settle which of two acts done on the same day is to prevail, the law takes no notice of part of a day, and that the first day to be counted is the day any part of which is occupied in the particular business which is to endure for a certain number of days in order to fulfil any requirement of the law. This principle is recognised in the often cited cases of *Combe* v. *Pitt* (1); *Field* v. *Jones* (2); *Glassington* v. *Rawlins* (3), where it was held that, under the statute which enacted that a trader lying in prison two months after an arrest for debt should be adjudged bankrupt, the day of arrest was to be included in the computation of two months; also in *Wright* v. *Mills* (4), and other cases; and this is stated to be the rule applicable to all judicial acts in the judgment of the Exchequer Chamber in *Edwards* v. *The Queen*. (5) There are no doubt several cases in which, when the date is to run from an act done, it has been held that the day in which the act is done is to be excluded from the computation: *Lester* v. *Garland*. (6) There are also cases in which, when a payment is to be made, or something is to be done, within so many days or months, or at the expiration of so many days or months, the day of the event within, or at the expiration of, so many days from which payment is to be made, or the act done, is not included in the reckoning. The case of a bill of exchange is a familiar instance. But I can find no authority for saying that the general rule ought not to apply to the case of a sentence of imprisonment. Nor can I see any ground for doubting that it applies to the case where the sentence is for a calendar month or a given number of calendar months, just as much as a sentence for so many days. Holding, then, that the first sentence in the present case must be computed from midnight on the 30th of October, when did the calendar month expire? The plaintiff contends that it expired at midnight on the 29th of November at the latest; and he does so on the ground that, if not, the plaintiff under a sentence of one calendar month's imprisonment would have to undergo something more than a calendar month's imprisonment, inasmuch as he would be imprisoned for the whole of one day in October, that is, from midnight on the 30th to midnight on the 31st of October, plus twenty-nine days and something more. Therefore, it is argued, it follows of necessity that he will have actually been imprisoned during the whole calendar month of November plus one day in October.

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(1) 3 Burr. 1434.
(2) 9 East, 151.
(3) 3 East, 407.
(4) 4 H. & N. 488. 5 Jur. N.S.
(5) 9 Ex. 628; 23 L. J. (Ex.) 165. 18 Jur.
(6) 15 Ves. at p. 254.

It appears to me that this argument, however plausible, is not sound. The question is, what is the meaning of one "calendar month" at the time the sentence was passed. And I am of opinion that at that time, viz., on the 31st of October, those words meant a month ending on the day in the succeeding month corresponding to the day of the sentence according to the ordinary understanding of the words "this day calendar month." The whole difficulty of the case here arises from the fact of October having thirty-one days and November only thirty; but I think that a few considerations will shew how that difficulty ought to be solved. Suppose, instead of the 31st of October, the sentence had been passed on the 26th, then, applying the rule mentioned above as to the commencement of the term, the prisoner would be entitled to count the whole of the 26th as a day of imprisonment; that is, the sentence would have begun to run from midnight on the 25th. I apprehend that none would contend that it would have expired before midnight on the 25th of November. Why? because that would be the expiration of the calendar month. Yet in that case, as in this, the calendar month spent in prison would have been one of thirty-one days, not of thirty days. This seems to shew that the meaning of "one calendar month" cannot be construed with reference only to the duration of the latter of the two months over which it may extend. If it did, then a sentence passed on the 29th of January would expire, not on the 28th of February, but at midnight on the 25th, because February being a calendar month of twenty-eight days, the prisoner would have in that sense spent a calendar month in prison.

In the case of bills of exchange, in which the word month is held to mean "calendar month," it is laid down by all the text writers that bills at one month drawn on the 28th, 29th, 30th, or 31st of January will fall due (excluding the days of grace) all on the same day, viz., the 28th of February; or in Leap Year on the 29th. Byles on Bills, 12th ed. p. 200; Chitty on Bills, 11th ed. note at p. 264. Yet those drawn on the 28th and 29th would, according to the mode of reckoning here contended for by the plaintiff, have been running one or two days more than the whole of February, and therefore more than a calendar month. It is no doubt true that the law applicable to bills of exchange depends upon the usage of merchants, and is not necessarily applicable to other cases, but where the question is what is the true meaning of "one calendar month," it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments. On the whole I am of opinion that a sentence of imprisonment for one calendar month, passed on any given day of any given month, is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day, but as long as there is a day in the calendar numerically corresponding from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no grounds for anticipating the expiration of the sentence. This being so, it follows that the plaintiff was not strictly entitled to his discharge until midnight on the 14th of December, being one calendar month and fourteen days from the time from which his first sentence began to run, and fourteen days from its expiration.

I am of opinion for these reasons, that the plaintiff who was discharged at 9 o'clock on the 14th of December was not detained illegally, and I accordingly give judgment for the defendant with costs.

June 12. The plaintiff appealed.

The plaintiff appeared in person, and contended first, that the question was one for the jury and not for the judge, and that as they had found a verdict for him with 20*s.* damages, the judge had no jurisdiction to enter judgment for the defendant; and secondly, that his term of imprisonment expired on the 13th of December, and that he had been imprisoned one day too much.

A. L. Smith, for the defendant, was not heard.

Bramwell, L.J. I am of opinion that the judgment of Denman, J., must be affirmed. No doubt it is a plausible argument that the prisoner having been confined during the whole of November, and one day in October has been in prison for more than one calendar month. The difficulty arises from the fact that the term calendar month is not strictly applicable, except to the particular months named in the calendar, and is inaccurate as applied to a period composed of two parts of different months; such a period in strictness consists of portions of two calendar months. The anomaly has several curious consequences, and among them that of which the plaintiff complains. The only rule which can be laid down is, that where an imprisonment for a calendar month begins on a day in one month and terminates in another, so many days must be taken from the second month, if there are enough as will bring the time up to the day before that day in the second month which corresponds to the day on which the imprisonment began; that is if the imprisonment began on the 5th it would end at 12 o'clock on the night of the 4th of the following month; if on the 25th it would end on the 24th; if on the 29th it would end on the 28th; that is to say, we must take as many days in the second month as had already passed in the month in which the imprisonment took place before the imprisonment. The plaintiff says that as he was imprisoned on the 31st of October, and had been in prison until the 30th of November, he had been imprisoned for the whole calendar month and one day, and therefore he ought to have been let out on the 29th. But if he had been sent to prison on the 29th he would have been liberated on the 28th, and if on the 30th he would have been liberated on the 29th. There is another difficulty, suppose he had been sent to prison for two calendar months he would certainly not have been liberated until the 30th of December. The rule I have laid down is therefore a sensible rule, which never operates to the detriment of the prisoner. If he is sent to prison in a long month, he gets thirty-one days; if he is sent to prison in a short month he gets thirty days; if he is imprisoned in February he would have the advantage of the short month; that being so the plaintiff's second period of imprisonment for fourteen began on the 1st of December and ended the 14th of that month.

BRETT, L.J. I am of opinion that the term a calendar month is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one.

COTTON, L.J. I am of opinion that Denman, J., was clearly right in dealing with this question as a matter of law; it is not a question of measurement of time, but of the technical meaning of the words "calendar month." Prisoners cannot always be imprisoned during one particular calendar month, in the sense of a month the name of which is to be found in the calendar. What then is the meaning of the term when the sentence begins otherwise than at the first day of a calendar month? Although there are difficulties, I am opinion that the right rule is that which has

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been laid down by Denman, J., and the other members of this Court. The imprisonment ends at 12 o'clock on the day immediately preceding the day in the following month corresponding to the day on which the imprisonment began. If there are not enough days in the second month to satisfy this rule the calculation is made in favour of the prisoner, and he will be liberated on the last day of the month. Thus the prisoner sentenced to a calendar month's imprisonment, will never be imprisoned for a greater number of days than there are in the month in which he was sentenced.

Judgment affirmed.

Solicitors for plaintiff: *Gold & Son.*
Solicitors for defendants: *Nicholson & Herbert.*

[IN THE COURT OF APPEAL.]

April 9.

REUTER, HUFELAND, & CO. *v.* SALA & CO.

Sale of Goods—Contract, not divisible.

The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October $\frac{\text{and}}{\text{or}}$ November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading.

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Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the *B.*, only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:—

Held (by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting), that the contract was entire, and that the defendants were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons according to the contract.

ACTION brought to recover damages for the non-acceptance of twenty-five tons of pepper under a contract made by Moon, Bower, & Co., brokers, on behalf of the plaintiffs with the defendants.

The contract was as follows. London, December 9, 1876. Sold for account of Reuter, Hufeland, & Co., about twenty-five tons (more or less) Penang black pepper October $\frac{\text{and}}{\text{or}}$ November ship-

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ment from Penang to London, per sailing vessel or vessels, at ($4\frac{3}{16}d.$) four pence and three-sixteenths of a penny per lb. for the sound portion thereof with an allowance of $\frac{1}{16}d.$ per lb. for first-class sea damaged, $\frac{1}{8}d.$ per lb. for second-class sea damaged, and $\frac{3}{16}d.$ per lb. for third-class sea damaged, and re-packed; guaranteed fair merchantable quality; if inferior, fair allowances to be made. To be landed and worked as usual at seller's expense. The name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading; but should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled, as far as regards such lost vessel or vessels, on the production of the bill or bills of lading by sellers as soon as fairly possible after the loss is ascertained. Should the vessel or vessels, and the pepper or any portion thereof be lost, this contract to be cancelled for the whole or such portion; but should the vessel or vessels be lost, and the pepper or any portion thereof be transshipped to some other vessel or vessels, and arrive on account of the original importers, this contract to stand good for the whole or such portion. Customary allowances and conditions. Any dispute arising out of this contract to be settled by arbitration in the usual manner. Prompt three months, for final day of landing. Deposit 20*l.* per cent. and difference on presentation of weight notes. No discount. Moon & Bower.

The remaining facts of the case fully appear in the judgments of the Court.

The trial took place before Lord Coleridge, C.J., without a jury, in London during the Trinity Sittings, 1878, and after time taken for consideration, Lord Coleridge, C.J., directed judgment to be entered for the defendants, on the ground that the plaintiffs not having declared the whole of the pepper according to the contract, within the stipulated time, they had not fulfilled their part of the contract.

The plaintiffs appealed.

March 6. *Benjamin, Q.C.*, *Pollard* (*Morgan Howard, Q.C.*, with them), for the plaintiffs, contended that the contract was not an entire contract, but was divisible; and that the declaration was good as to twenty tons. They relied on *Brown* v. *Muller* (1); *Brandt* v. *Lawrence* (2); *Bowes* v. *Shand.* (3)

March 7. *W. Williams, Q.C.*, and *J. C. Mathew*, for the defendants, contended first, that the contract was not divisible; secondly, that the declaration of twenty-five tons was not one which they were bound to accept, as five tons had not been shipped according to the contract.

Cur. adv. vult.

April 9. The Court having differed in opinion, the following judgments were delivered:—

THESIGER, L.J. This is an action brought by the plaintiffs as sellers against the defendants as buyers for the non-acceptance of about twenty-five tons of black pepper shipped from Penang to London. The defendants refused to accept any portion of the pepper, while the plaintiffs have contended in this court that the defendants were either bound to accept and take delivery of the whole, or at least were bound to take delivery of a portion, amounting to about twenty out of the twenty-five tons.

The contract between the parties was made on the 29th of December, 1876. [The Lord Justice read the contract.]

On the 19th of January, 1877, the plaintiffs, purporting to act in pursuance of the contract, declared by a vessel called the *Borga* 500 bags of black Penang pepper, which would be equal in weight to about twenty-five tons, in three parcels, the subject of separate bills of lading—namely, 285 and 110 bags under bills of lading dated the 29th of November, 1876, and 105 bags under a bill of lading dated the 11th of December, 1876. In answer to the declaration, the defendants by letter requested information as to the date of the shipment of the pepper. On the 22nd of January, 1877, they repeated the request; and on the 24th of January, 1877, having in the meanwhile received no information as to the date of shipment, the defendants asked whether the declaration or, as they called it, the tender of the 19th of January was final or not, and were answered on the same day that it was. On the

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(1) Law Rep. 7 Ex. 319.

(2) 1 Q. B. D. 344.

(3) 2 App. Cas. 455.

25th and 26th of January the defendants again inquired as to the date when the whole of the pepper was shipped; and on the 27th of January Messrs. Moon, Bower, & Co., acting for the plaintiffs, wrote to the defendants, "We beg to acknowledge receipt of your memo. of yesterday's date, and are at a loss to know what you want. We have already furnished you with dates of bill of lading, which in declaration is always considered sufficient." To which letter the defendants replied on the same day, "Pepper contract. 29/12/76. We have your memo. of this day. By furnishing us with dates of bill of lading you only fulfil one part of your contract; but the most important for us is the date of shipment, which, according to the contract, ought to have been made at the latest during November. We want then to know if you tender the said 500 bags as being all shipped during November."

Upon the same day an interview took place between the parties, with the object, so far as the plaintiffs were concerned, of learning whether the defendants would accept the declaration, but nothing definite passed. In point of fact, the shipment of the 105 bags under the bill of lading of the 11th of December, 1876, had not been made until the month of December; and on the 30th of January, 1877, the defendants wrote to the effect that they did not accept the declaration, as it was not for the full quantity according to the contract terms. Upon the 31st of January, the plaintiffs, through Messrs. Moon, Bower, & Co., proposed by letter an arbitration to decide whether their tender or declaration constituted a fair delivery against the contract; and in answer to that letter the defendants, on the 2nd of February, wrote as follows: "If the pepper you tender is all of November shipment at latest, there is nothing to arbitrate upon, and the contract would be in order so far. If any portion of what you have tendered is not November shipment at latest, we reject said tender entirely, and refuse to arbitrate, as the contract has not been fulfilled by you."

On the 5th of February the plaintiffs substituted for the declaration of the 105 bags by the *Borga* under bill of lading of the 11th of December, 1876, a declaration of a similar number of bags by the same vessel under a bill of lading of the 29th of November, 1876; but this declaration being made more than sixty days after the date of the bill of lading to which it referred, the defendants on the same day wrote as follows: "We have your memo. of this date, and do not admit your tender. If even other reasons did not exist, as you will find by previous correspondence, your tender aforesaid would be out of date." Some correspondence then passed between the parties, upon which, coupled with what passed before and at the interview on the 27th of January, the plaintiffs found a contention that either the stipulation as to time of declaration was waived, or the defendants, by their conduct, had misled the plaintiffs into a belief that the breach of the stipulation would not be relied on, and were estopped from setting up such breach. It does not seem to me that this issue, which would be one peculiarly suitable for a jury, was really intended to be tried, or indeed was tried, when the parties dispensed with a jury and took the case before Lord Coleridge, C.J., alone, and it is not mentioned in his judgment. But assuming it be open to the plaintiffs, I am of opinion that the evidence wholly fails to support their contention. I gather from the evidence that down to the time that the declaration was finally rejected, both the parties were standing upon their strict rights, and the plaintiffs had due warning from the defendants that they at least were doing so; and I can see no ground for the imputation that the defendants wrongfully induced the plaintiffs to believe that time was or would be waived, or did anything which could be construed into a waiver or its equivalent.

I revert again to the evidence. In a letter of the 2nd of June, Moon, Bower, & Co., as the plaintiffs' agents, "advise the arrival of the *Borga* from Penang, in which vessel you are interested, as per contract dated 29th December." To that letter the defendants, on the 7th of June, replied:—"*Borga.*—We have your memo. of the 2nd instant advising arrival of the above vessel. By our previous memorandums, which we now confirm, you will find that we rejected your tender of pepper by this vessel."

On the 26th of June samples of the pepper which was included in the declaration on the 19th of January, as altered by that of the 5th of February, and all of which was a November shipment, were tendered. The defendants rejected the whole of these samples, and this action was then brought.

I have already stated my opinion that there was no waiver of the time within which the declaration was to be made, and no conduct of the defendants estopping them from setting up the breach of the stipulation in regard to time, and it follows that the declaration not being in time, as regards five tons, the plaintiffs cannot maintain their action for the non-acceptance of the whole twenty-five tons.

The argument before us has, however, been mainly directed to the question whether the plaintiffs can maintain this action in respect of the twenty tons. I am of opinion that they cannot do so. The subject of the contract is the sale of a specific quantity of a given article, with a margin for a moderate excess in or diminution of that quantity under the words "about" and "more or less."

The rule applicable to such a contract, if it were not qualified by other provisions, would be that, subject to the moderate margin, the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity.

In the present case if the five tons shipped, or declared too late, be excluded, the diminution in quantity is clearly beyond the margin. But the contract also provides that the shipment is to be "per sailing vessel or vessels, and that the name of the vessel or vessels, &c., is to be declared within sixty days of the bill of lading." Founding their argument on these provisions, the plaintiffs contend that they were entitled to call upon the defendants to accept delivery of any substantial portion of the pepper, whatever might be their position or declared intentions as regards the remainder, and they rely upon the decision of *Brandt* v. *Lawrence* (1) in support of this view. The defendants, on the other hand, contend that they were not bound to accept anything less than the whole of the pepper, subject to a moderate margin, expect in the case of loss of vessel or vessels and pepper expressly provided for by the contract; or at least, that under the circumstances of this case they were not so bound. I do not accede to the defendants' contention, so far as it rests on the provisions of the contract relating to the loss of vessel or vessels and pepper; for these provisions are in my opinion inserted alio intuitu. I think that they were intended to protect the sellers from any action for non-delivery caused by the happening of the contingencies provided for. But I am of opinion that the defendants' contention is otherwise well founded. *Brandt* v. *Lawrence* (1) was a case where Russian oats were sold under a contract by which the shipment was to be by steamer or steamers in a particular month, conditionally upon ice at loading port not preventing it, in which event shipment was to be made immediately after the opening of the navigation. Payment was to be made in respect of any shipment by cash on receipt of, and in exchange for shipping documents. Under this contract a portion of the oats, together with other oats the subject of another contract, was shipped, in consequence of ice, after the specified month, but immediately after the navigation was opened, and was refused by the defendants on the ground that the shipment had been made too late. At the time of this refusal the sellers were acting in strict accordance with their contract, and there was nothing to indicate that the contract would not be performed by them in its entirety. Afterwards, and beyond the time allowed by the contract, the remainder of the oats were shipped, and were also, but in this case rightly, refused. In an action for non-acceptance of both parcels of oats the facts were proved as above stated, and a verdict having been found for the plaintiffs in respect of the first shipment, a motion for a new trial was refused both in the Queen's Bench Division and on appeal in this Court.

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(1) 1 Q. B. D. 344.

But in the present case the facts are very different. In the first place, the declaration of the pepper named but one ship, and the pepper tendered did in fact arrive by one ship. In the second place, there has not been at any time either a declaration or a tender of the twenty tons of pepper which the plaintiffs contend that the defendants are bound to accept, apart from the five tons which, upon this branch of the case, they admit that the defendants were not bound to accept. The matter seems to stand thus: if the declaration of the 19th of January be relied upon, then the plaintiffs indicated by that declaration their intention of calling upon the defendants to accept under the contract of the 29th of December, 1876, twenty-five tons of pepper, five tons of which were not of October or November shipment. If the declaration of the 5th of February be relied upon as severing those five tons from the remainder, and cancelling the previous declaration made of the twenty-five tons, then it is clear that it at the same time added another five tons, which the defendants were equally not bound to accept, inasmuch as the sixty days within which the declaration was to be made had expired, and even if those five tons had not been added, the declaration of the twenty tons as a separate parcel would seem only to date from that day, and would, therefore, also be too late. But the plaintiffs endeavoured to displace these positions by the argument that, as the pepper tendered was shipped under three separate bills of lading, and was so declared, the declaration and tender, although one in fact, may be treated as separable in law, and consequently that the defendants were bound to accept the twenty tons, which, upon this hypothesis, were properly declared and tendered.

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(1) 1 Q. B. D. 344.

I cannot assent to this argument. In mercantile contracts like the present, the making within a given time of a declaration or declarations upon which the buyers may act, is an essential feature of such contracts: and further, although the sellers have an option to ship the article contracted to be sold, either by one or more vessels, and the provision in the contract to that effect may give, as, according to *Brandt* v. *Lawrence* (1), it does give, the sellers a right to call upon the buyers to accept any portion of the quantity contracted to be sold, which has been shipped and declared in accordance with the contract, and as a step towards its entire performance, it does not appear to me, by any means, to follow that the quantity named in the contract is not still of the essence of the contract, and if it be so, the case is, in this respect, distinguishable from *Simpson* v. *Crippin* (2), and cases of that class, where each delivery of coal was really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties might well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract. But, however this may be, the present contract ought and must, in my opinion, at least, involve this consequence, namely, that where the sellers elect to ship by one vessel the whole quantity contracted to be sold, and declare their election to the buyers, still more when they follow up their election and declaration by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which though physically separable, and the subject of distinct bills of lading, yet had always been treated by the sellers as part of one entire whole, which the buyers by the declaration were told to treat, and by the tender were called upon to accept, as one entire whole.

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(1) 1 Q. B. D. 344.

(2) Law Rep. 8 Q. B. 14.

The matter may be made more plain by reversing the position ot the parties. Suppose a declaration such as was made in this case on the 19th of January, and that the fact had been that all the then parcels had been shipped in accordance with the terms of the contract; suppose also that under such circumstances the defendants had, either at the time of declaration or when the pepper was tendered, expressed their willingness to take the twenty tons, but had absolutely refused to take the five, the plaintiffs might clearly have said, "We make this declaration or tender as a whole, and will only deliver the pepper comprised in it as a whole." If that be not so, where would the defendants' right of separation cease? They might, of course, take one only of the three parcels, and it is difficult to see on what logical or legal principle they might not demand to have some bags out of the one parcel, and say, "We will pay for the non-acceptance of the remainder in damages." This would reduce the matter to a practical absurdity. But on the other hand, if the sellers' right would, under the circumstances supposed, be such as I have suggested, namely, the right to have the pepper accepted as a whole, and the consequent right of treating the contract at an end if the buyers refuse to accept it as a whole, surely the converse proposition must hold, namely, that where the shipment comprised in one declaration is in part good and in part bad, and although the good and bad parts are separable, yet the sellers adhere to the declaration as a whole and tender the shipment as a whole, the buyers must have a right to reject unconditionally both the declaration and the whole of the goods tendered under it: and, further, that the defendants would not be bound to accept the part of the shipment which in itself complied with the terms of the contract, if after the declaration and tender, and after it was apparent that the sellers' contract could not be performed in its entirety by delivery of the whole of the goods contracted to be sold, the sellers separated the good portion of the shipment from the bad, and made a fresh tender of the former for acceptance. Looking at the case from this point of view, it is really untouched by either the coal cases to which I have referred, or the decision in *Brandt* v. *Lawrence* (1), and upon the grounds mentioned I arrive at the conclusion that the plaintiffs cannot maintain their action against the defendants in respect of any portion of the pepper which was the subject of their contract, and that the judgment of Lord Coleridge, C.J., should therefore be affirmed.

COTTON, L.J. This was an action on a contract dated the 29th of December, 1876, whereby the defendants agreed to buy from the plaintiffs twenty-five tons of pepper, more or less, of October or November shipment, from Penang to London, per sailing vessel or vessels, the name of the vessel or vessels, marks, and other particulars, to be declared within sixty days from the date of the bill of lading.

On the 19th of January, 1877, the plaintiffs, by a letter addressed to the defendants, declared twenty-five tons of pepper shipped in several parcels on board the *Borga*. Of these twenty-five tons five had in fact been shipped in December, and were, therefore, not pepper which, according to the contract, the defendants were bound to take; and on the 30th of January the defendants declined to take the twenty-five tons. Afterwards, but after the expiration of the time within which the pepper was under the contract to be declared, the plaintiffs declared other five tons of pepper shipped in November on board the same vessel, in substitution for the five tons previously declared, but which were not shipped till December, and to which the defendants had a right to object. The vessel arrived in this country in June, and the defendants refused to take the pepper, hence the present

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(1) 1 Q. B. D. 344.

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action, and Lord Coleridge, C.J., decided in favour of the defendants that they were not bound to take the twenty-five tons of pepper, or any part thereof.

The plaintiffs have appealed to this Court. The first point urged by the plaintiffs was, that the defendants, before the expiration of the time within which, under the contract, the plaintiffs were to declare the twenty-five tons, had by their conduct either waived the condition as to time, or induced the plaintiffs to believe that the condition would not be insisted on, until it was too late for them to declare other five tons in substitution for that part of the twenty-five tons which were shipped in December, and, therefore, not in accordance with the contract. In my opinion this contention cannot be supported. It was for the plaintiffs to declare twenty-five tons of pepper of the quality and shipped at the time stipulated by the contract, and to do so within a limited time. The defendants were indeed asked, on the 27th of January, whether they insisted on the objection that five tons were not of October or November shipment, and they did not answer till the 30th of January. But there is really nothing to support the contention that this delay, if any, was intended to mislead the plaintiffs, and in the absence of evidence from which such a conclusion could be arrived at, we cannot relieve the plaintiffs from the stipulation as to time.

It was argued that the rules of courts of equity are now to be regarded in all courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must therefore hold that the time within which the pepper was to be declared was an essential condition of the contract, and in such a case the decisions in equity, on which reliance is placed, do not apply.

But then it was urged, that the contract was divisible, and that the defendants were bound to take the twenty tons, that is to say, that although five tons was a difference which could not be covered by the words "more or less" under this contract, the defendants would be bound to take and pay for any substantial portion of the twenty-five tons, which the plaintiffs might be ready and willing to deliver to them; and in support of this contention, reliance was placed on the words "per sailing vessel or vessels;" and it was argued that this shewed that the contract was divisible. In my opinion, it has not this effect. These words did indeed shew that the twenty-five tons might be delivered in several parcels, and possibly might arrive in England at different times. But this is very different from the contention that the defendants having stipulated for twenty-five tons, would be bound to take a small portion, say five tons, when the plaintiffs were unable or unwilling to supply the balance of the stipulated quantity. The contract in his case was in December, after the pepper must, in order to comply with the condition of the contract, have been shipped, and I think that the reference in the contract to "vessel or vessels," may well have been intended to obviate any difficulty arising from the circumstance of twenty-five tons, the required quantity of pepper, not having been shipped in one vessel. But I think that to enable the plaintiffs to require the defendants to take and pay for the pepper, there must be the twenty-five tons, though in different vessels. But it is urged that the decision in *Brandt* v. *Lawrence* (1) had given a judicial interpretation of these words, "per vessel or vessels," in a contract which would be otherwise entire and indivisible. I cannot consider the case of *Brandt* v. *Lawrence* (1) as laying down a general rule of construction, but merely as deciding that the contract in that case having regard to the words "vessel or vessels," was divisible. The contract is not stated at length in the report, but we have been furnished with a copy of it. There the contract was entered into before the shipment was under the contract to be made; and payment was to be made in cash on receipt of, and in exchange for, shipping documents. In that case the seller shipped in a vessel a portion of the oats, and tendered it to the buyer with a view to the supply of the entire quantity, and the whole of the oats in that vessel were oats which complied with the conditions of the contract as to quality and time of shipment, and the seller had therefore, under the contract, a right to ask for the price in

(1) 1 Q. B. D. 344.

cash for this part of the entire quantity in exchange for the bill of lading. This is, I think, a substantial difference between the contracts in the two cases, and sufficient to prevent the construction put upon the contract in that case, affording authority for the decision in favour of the plaintiffs in the present contract. There is also a difference in the circumstances under which the plaintiffs in this action make their claim, for in the present case the plaintiffs have not severed or separated the twenty-five tons of pepper, which is the subject of the contract, in the only way contemplated by the contract, namely, by shipping it in different vessels; but have shipped in one vessel twenty-five tons of which they contended the defendants are bound to take the whole. I am of opinion, that the decision of Lord Coleridge, C.J., was correct, and must be affirmed.

BRETT, L.J. In this case the facts which I consider material are that a contract of purchase and sale was entered into between the plaintiffs and defendants on the 29th of December, 1876. By it the plaintiffs sold to the defendants about twenty-five tons, more or less, Penang black pepper, October $\frac{\text{and}}{\text{or}}$ November shipment, from Penang to London, per sailing vessel or vessels, at $4\frac{3}{16}$*d.* per lb. The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing within sixty days from date of bill of lading; but should the vessel or vessels which may apply to this contract be lost before declaration this contract to be cancelled as far as regards such lost vessel; should the vessel or vessels and the pepper, or any portion thereof, be lost, this contract to be cancelled for the whole or such portion, &c. Prompt three months from final day of landing. Deposit 20 per cent., and difference on presentation of weight notes. No discount. In fulfilment of this contract the plaintiffs, on the 19th of January, within sixty days of the dates of three respective bills of lading of pepper shipped on board a vessel called the *Borga*, declared in one declaration three distinct parcels of pepper, all on board the *Borga*.

Thus:—S B

B 285 bags—bill of lading dated 29th November.
C 110 bags—bill of lading dated 29th November.
F 105 bags—bill of lading dated 11th December.

Two of the parcels, which amounted to twenty tons, were shipped and declared in accordance with contract; but the third parcel, although declared within due time after the date of the bill of lading, did not fulfil the contract, because it was not a November shipment.

The plaintiffs were asked whether this declaration, which both parties called a tender, was final, and answered that it was. On the 27th of January the plaintiffs asked whether the defendants would accept the December shipment named in the declaration of the 22nd of January. No definite answer was given. But on the 2nd of February the defendants refused the whole on the ground that a part was not a November shipment. It is somewhat difficult to appreciate the legal effect of this refusal. I know of no legal obligation to accept or reject a declaration which is an act to be done solely by the seller, or of any legal effect to be given to an alleged refusal to accept a declaration. The highest effect which can be given to this refusal, at this time, is that it is a notice by the defendants that they do not accept the declaration as good for twenty-five tons.

On the 5th of February the plaintiffs wrote to substitute for the December shipment a November shipment, which was also on board the *Borga*. The date of the bill of lading of this lot was the 29th of November, that is, they offered a November shipment. But they made the offer or declaration more than sixty days after the date of the bill of lading. This was refused by the defendants. The *Borga* arrived in June. The plaintiffs then tendered three parcels of Penang pepper, all of November shipment, and amounting in all to twenty-five tons, being the two parcels of November shipment, declared on the 19th of January, and the one parcel offered or declared on the 5th of February, but which last was not declared within sixty days of the date of the bill of lading relating to it.

The defendants refused to accept any part on the ground, by reference to their formal letter as to the declaration, that they would not receive a part if offered, because the whole had not been declared according to contract. Upon this state of facts it is obvious that the declaration of twenty tons per *Borga* made on the 19th of January was a sufficient declaration of twenty tons

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unless the declaration of so much was rendered nugatory by the wrong declaration of the other five tons, the December shipment. And it is equally obvious that after the 28th of January the plaintiffs could not make a valid declaration of any November shipment, so that on the arrival of the ship in June the plaintiffs could only tender as well shipped and also well declared twenty tons, and could not by any contrivance tender as well shipped and also well declared the other five tons. The plaintiffs did tender twenty-five tons. If the defendants had refused on the ground of having twenty-five tons offered to them, whereof they were bound to take only twenty tons, so that they left it open to be said that if the twenty tons had been offered to them they might have accepted them, then the tender of the twenty-five tons must have been bad; but the defendants did not take that point, they refused in terms which amounted to saying that they would not take the twenty-five tons, nor the twenty tons if offered, because they could not have the twenty-five tons shipped and also declared according to contract. This refusal seems to me to have absolved the plaintiffs from the necessity of tendering separately the twenty tons, and to oblige us to treat the case of liability as if the plaintiffs had tendered the twenty tons at the time when they tendered the twenty-five tons. The question is whether if the plaintiffs had tendered the twenty tons only, not being able to tender according to contract any five tons to make up the twenty-five tons, the defendants could have refused to accept the twenty tons. That raises, first, the question what is the proper construction of the contract? In *Jonassohn* v. *Young* (1), an action was brought for not accepting coals, the contract was that the plaintiff would sell and deliver to the defendant as many coals equal to a former sample cargo as a steamer called the *Great Northern* could fetch in nine months, proceeding to and from Sunderland, from and to London, backwards and forwards in successive voyages. The steamer to be sent by the defendant, and the plaintiff to ship the coals at 5*s*. 9*d*. a ton, payment at the beginning of each month for the preceding month's shipments, less 2½ per cent discount. The defendant pleaded that in the first voyage the defendant shipped a cargo, not equal to sample, to this plea there was a demurrer.

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(1) 4 B. & S. 297. 10 Jur. N.S. 43

The failure of the first cargo was therefore admitted. It was impossible that the plaintiff could by any subsequent deliveries satisfy the contract, if it was one and indivisible; but the Court held that the plea was bad because the breach by the plaintiff went only to part of the consideration. Now the consideration for the whole of the defendant's undertaking, which was of course the undertaking to accept and to pay for all which the plaintiff was to deliver, was that the plaintiff undertook to deliver all, and to deliver a cargo each time that the defendant should send the steamer. The judgment is that the failure to deliver the first cargo according to contract, though an incurable failure, did not absolve the defendant from the duty of accepting the subsequent cargoes, because the failure as to the first cargo was only a breach of a part of the consideration moving from the plaintiff.

Apply that case to the question raised in this. Here the whole consideration for the defendants' promise to accept the pepper was the plaintiffs' promise to deliver the whole twenty-five tons. The plaintiffs were ready and willing to deliver twenty-tons, but failed by an incurable failure to be able to deliver the other five tons. The case cited answers that the failure of the plaintiffs is a breach of only a part of the consideration, and the defendants are not absolved from the duty of accepting the twenty tons. In *Simpson* v. *Crippin* (1), the action was for non-delivery of coal, the defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into defendants' waggons at plaintiffs' collieries in equal monthly quantities during the period of twelve months from the 1st of July at 5*s.* 6*d.* per ton; terms, cash monthly less 2½ per cent. discount. The plaintiffs failed to send waggons according to the contract in the first month, that was an incurable failure. Their part of the whole contract never could afterwards be fulfilled. The judge told the jury that, as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants in point of law in cancelling the contract. "It cannot be denied," says Blackburn, J., "that the plaintiffs were bound in every month to send waggons capable of carrying at least 500 tons, and that by failing to perform this term they have

(1) Law Rep. 8 Q. B. 14.

committed a breach of the contract, and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of waggons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely on the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract." Apply that case to the present. The point taken on behalf of the defendants is, that by reason of the incurable breach as to the five tons, the defendants are entitled to rescind the contract as to the twenty tons. The answer is, no sufficient reason has been shewn why damages would not be a compensation for the breach by the plaintiffs as to the five tons. In *Brandt* v. *Lawrence* (1) the action was for non-acceptance of oats. By the contract the defendant bought of the plaintiff 4500 quarters of Russian oats, at 23*s.* per delivered 304 lbs., including freight and insurance to London. Shipment by steamer or steamers during February. Payment by cash on receipt of and in exchange for shipping documents, less interest at 5 per cent. for the unexpired portion of three months from date of bill of lading. In fulfilment the plaintiff tendered 1139 quarters per *Winsland.* The defendant for a given reason refused to accept them. The plaintiff afterwards tendered the balance of quantity brought by a ship called the *Oxford,* but brought too late. At the time of action brought, therefore, the plaintiff had tendered in good time a part of the oats, but had never tendered, and never could tender, the balance within the terms of the contract, if treated as one and indivisible. It was argued for the defendant that the contract was an entire contract for the delivery of 4500 quarters of oats within a specified time; it could not be split into parts; if the whole was not shipped in time, the defendant was entitled to reject the part which was in time. The Queen's Bench Division thought that this was not so, because the contract says, "shipment by steamer or steamers." In the Court of Appeal, Mellish, L.J., said, "I think the legal inference is that it was intended that the shipment should be made (which must

(1) 1 Q. B. D. 344.

mean might be made) in different parcels, and that the purchaser was bound to accept them as they came if they were in time;" and, again, "was the purchaser bound to accept that part of the goods which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by steamer or steamers." That judgment was rested solely on the construction of the contract, no reliance was placed on any power of election by the seller to send by two ships instead of one. As the case stood, it was the same as if he had only shipped a portion by one ship, and had never shipped the other portion by any ship. The late shipment was no shipment according to the contract. Apply that case to the present. The contention here is that the defendants were not bound to accept twenty tons, because there was no shipment and declaration of five tons according to contract. The question is, were the defendants, the purchasers, bound to accept that part of the goods which was shipped and declared in time? The answer, according to the Queen's Bench Division, and on appeal in the case cited, is that they were, because the contract says that the shipment is to be—that is, may be—in "sailing vessel or vessels." Mellish, L.J., cited in that case the case of *Simpson* v. *Crippin.* (1) It is obvious to my mind that he considered the case before him to be governed by that case, and that case was in its turn in terms founded on *Jonassohn* v. *Young.* (2) The chief use of authoritative cases is to enable us to deduce, if we can, from them a general principle applicable to succeeding similar, though not identical, cases. It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fufil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been or should be always ready, and willing, and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other. Suppose, in the case of shipments, the seller has by contracts made abroad provided for all the successive shipments, and has taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfil his contract, so that the first shipment fails, the purchaser under the main contract we are discussing may, upon one construction suggested, throw up the whole contract, although he could be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts, and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensation. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages; or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations shew that the rule of construction adopted by the Courts is as sound on mercantile as it is on legal considerations, and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view; moreover, it is most important, in my opinion, that the

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(1) Law Rep. 8 Q. B. 14.

(2) 4 B. & S. 297. 10 Jur N S 63

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construction of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on slight variations either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in *Brandt* v. *Lawrence* (1), but it differs very little as to the terms of payment from the other cited cases. That difference as to the periods of payment makes no difference in the reasons given for the decisions in those cases, in which the stipulation as to the payment was not noticed, and in *Brandt* v. *Lawrence* (1) it is not even reported.

I am of opinion that the plaintiffs are entitled to recover in respect of twenty tons, leaving the defendants to a cross action in respect of five tons.

Judgment affirmed.

Solicitor for plaintiffs: *John Rae.*

Solicitors for defendants: *Hollams, Son, & Coward.*

April 29.

JOHNSON *v.* PALMER.

Practice—County Court—Remitted Action—High Court Pleadings—Amendment of Writ and Particulars—30 & 31 *Vict.* c. 142, s. 10—*County Court Rules*, 1875.

10 QBD 476

When an action is remitted from the High Court under 30 & 31 Vict. c. 142, for trial and the writ, and statement of claim, if any, are lodged in the county court, together with particulars given under the County Court Rules, 1875, Order XX., rule 1, the county court judge ought not to restrict the plaintiff to proof of the claim as indorsed on the writ or stated in the particulars, but should take cognizance of the statement of claim, and, if asked to do so, receive evidence in support of the allegations therein.

APPEAL from the County Court of Middlesex, holden at Bow.

The action was originally brought in the High Court, by a writ endorsed with a claim "for damages for allowing smoke to issue from a chimney on the defendant's premises in such a manner as greatly to injure the goods in trade and business of the plaintiff, when he might, and he could, and he ought to have prevented it, 50*l.*;" and the plaintiff delivered a Statement of Claim alleging that the defendant carried on his business as a blacksmith in a shed abutting on the yard of the plaintiff's house, that on divers occasions the defendant, when he might and could have prevented it, allowed large quantities of smoke to be emitted from a chimney in the roof of the shed, and allowed smoke to escape between the tiles which formed the roof of the shed, and through an aperture beneath the roof thereof, and through many broken windows in the side thereof, which smoke was blown upon the plaintiff's premises.

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(1) 1 Q. B. D. 344.

The plaintiff alleged damage to his stock-in-trade, and discomfort, and claimed 50*l.*

A master by order under 30 & 31 Vict. c. 142, s. 10, remitted the cause for trial before the Bow County Court, and the original writ, the statement of claim, and the order were lodged there by the plaintiff, who under the County Court Rules of 1875, Order XX., rule 1, lodged also particulars of claim corresponding with the indorsement on the writ.

At the trial the plaintiff tendered evidence to prove his principal cause of complaint, viz., that smoke had been allowed to escape from between the tiles of the roof, as alleged in the statement of claim, but the learned judge ruled that the plaintiff was bound by the claim indorsed on the writ, and stated in the county court particulars, and, declining to take cognizance of the statement of claim, rejected the evidence.

A rule having been obtained for a new trial on the ground of the rejection of this evidence,

Sims, for the defendant, shewed cause. When an order is made under 19 & 20 Vict. c. 108, for a cause to be tried in the county court, the plaintiff must by s. 26 lodge with the registrar "such order and the issue." The action remains in the High Court, and the issue merely is tried in the county court. But when an order is made under 30 & 31 Vict. c. 142, the plaintiff must by s. 10 lodge the original writ and the order, and, by Order XX., rule 1 of the County Court Rules, 1875, also lodge a concise statement of the particulars such as would be required on entering a plaint. Thereupon the registrar sends the particulars to the defendant, and the whole action proceeds in the county court thenceforth as if it had been originally brought there. The plaintiff followed the directions of the rule. He was, like ordinary suitors in the county court, bound by his particulars, and the judge was right in restricting him to them, and in not regarding the statement of claim for which they were substituted. The defendant came prepared with evidence to meet the matter of complaint alleged in them, and would have been taken at a disadvantage if the plaintiff had been allowed to prove other matters which the defendant might well suppose to have been abandoned. No doubt the indorsement on the writ might have been amended had the action been tried in the High Court, but the county court judge has only the same powers and jurisdiction to try it as if it had been commenced in his own tribunal.

Romilly, in support of the rule. The defendant was aware of the statement of claim, and could not fairly assume any change in the cause of action. He knew what the complaint was. The judge should have permitted the plaintiff to prove his whole case, and was wrong in refusing to hear it.

[DENMAN, J. But the whole cause went to him under 30 & 31 Vict. c. 142: *Moody* v. *Stewart.* (1)]

He should have amended, if necessary, as he had ample powers to do: see Pollock and Nicol's Practice of the County Courts, 8th ed. p. 172. Amendment of the indorsement in the writ was unnecessary, a statement of claim having been delivered: *Large* v. *Large.* (2)

LORD COLERIDGE, C.J. The rule must be made absolute. This action of tort was sent down to be tried in the county court under 30 & 31 Vict. c. 142, s. 10, which enacts that such an action may be remitted there, possibly after all the pleadings are completed and issue joined (for there is in this section no provision as in that relating to contracts that the case shall be remitted within eight days after writ), if a judge is satisfied that it ought to be sent to the county court for trial. Then what is to be done? "Thereupon the plaintiff shall lodge the original writ and the order with the registrar of such county court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys, and the county court shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court." The words are—not that it shall be commenced by plaint, or shall be from that time the same as an action in the county court, but—that the county court shall have the same jurisdiction as if the action had been brought in the county court. It would be technical indeed to hold that when the proceedings in the superior Court are carried to completion, and the cause is simply sent for trial in the county court, the judge is entitled to disregard all the proceedings in the superior Court and to refuse to look at the statement of claim. *Moody* v. *Stewart* (1) shews that when the cause is remitted under this Act to the county court it is there for all purposes. In that case it was held that after an action had been remitted under 30 & 31 Vict. c. 142. s. 10, the Court in which the action was brought had no jurisdiction over the costs, and could not make an order to tax them. In this case there was a writ of summons issued which made mention of damage by smoke, but only by smoke proceeding from a particular part of the defendant's premises. The statement of claim delivered thereupon was for the same substantial cause of action, viz., the nuisance of smoke, but enlarged the locality from out of which the smoke arose, and alleged that smoke issued not only from the chimney but from the tiles. In this state of things—the writ mentioning the chimney and the statement of claim something more—the cause was remitted to the county court judge with the proceedings in the superior Court as far as they had then gone; and, of course, the defendant knew to what extent they had gone, and knew the statement of claim as well as he knew his own case, and the county court judge knew what he had to try when the claim was sent to him. Yet when the plaintiff was proceeding to prove his claim, he was stopped by the county court judge, saying that he would not look at the claim, although it was before him. It seems to me that he was wrong to limit the proceedings before him by the narrower practice—if it be narrower—of his own court. He was bound to try the cause in the state in which it came to him, and to look at all the proceedings in the superior Court as if they were in his own court. It is admitted that at any stage of the proceedings in the superior Court—at any period and under any circumstances—the writ would be immediately amended to suit the statement of claim. The Master of the Rolls has held in *Large* v. *Large* (1)—and I am glad of authority for this sensible decision—that there is no necessity for such an amendment when the statement of claim is there to be looked at. So that if the case had remained in the superior Court no amendment would have been necessary. The judge of the county court, however, refused to try the case, he rejected evidence, was wrong in doing so, and the rule must be absolute for a new trial.

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(1) Law Rep. 6 Ex. 35.

(2) W. N. 4th Aug. 1877, p. 198.

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(1) Law Rep. 6 Ex. 35.

DENMAN, J. I am of the same opinion. If I thought that this was only a case in which the learned county court judge had exercised his discretion otherwise than I should have exercised mine, I should not have felt justified in interfering, for we are only here to grant new trials from the county court where there is some miscarriage in point of law. The point of law raised is that the judge refused to go into any evidence whatever of the substantive cause of action of which the plaintiff complained. The question is whether he had a right to complain of this cause of action? It is said that he had not, because in the original writ in the superior Court no mention was made of smoke from the roof. But there had been a statement of claim in which that was complained of and brought to the attention of the defendant. When the cause went to the county court judge, he not only had before him the original writ, which goes down under a special rule, but also the statement of claim, so he was not ignorant of it. I think it was the right of the plaintiff to have that claim inquired into, and that in rejecting it the county court judge made a mistake in point of law, and that therefore the plaintiff has a right of appeal. I can quite understand that if the defendant had not had full notice of the claim the learned county court judge might have adjourned the case. But here it was not so, for the defendant must have known that part of the case meant to be insisted on. There must be a new trial.

Rule absolute for a new trial.

Solicitor for plaintiff: *Kimber.*

Solicitors for defendant: *Wood & Hubbard.*

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(1) W. N. 4th Aug. 1877, p. 198.

GIBBONS *v.* THE LONDON FINANCIAL ASSOCIATION.

1879
May 1.

Practice—Appeal from Master—Time for—Enlargement of—Order LIV., rule 4 *—Order LVII., rule* 6*—Order LIV. rule* 1.

5 App Cas 689

Within four days from the decision of a master at chambers, an appeal summons was taken out and made returnable at a date after the expiration of the four days, but on the first day when any judge would sit at chambers:—

The Court *held*, that, under the circumstances, the time might be enlarged under Order LVII., rule 6, and that no summons for that purpose was necessary under Order LIV., rule 1.

Motion on appeal from chambers.

On the 7th of April the hearing of a summons for the vivâ voce examination of the defendants' accountant, on the ground that his answers to interrogatories were insufficient, the master made an order for the examination. On the 10th of April an appeal summons was taken out for the defendant by his solicitor's clerk, who was informed upon inquiry at chambers, that no judge would sit at chambers on the 11th of April, Good Friday, nor until Thursday, the 17th of April, and therefore made the summons returnable on the 17th of April.

At the hearing of the appeal summons before Field, J., at chambers, an objection was taken that, as the summons had not been made returnable within four days from the decision appealed against, the appeal was too late. *Bell* v. *North Staffordshire Ry. Co.* (1), having been cited in support of this objection, the learned judge, acting upon that case, refused to hear the appeal.

J. C. Mathew, in support of the motion. First. Order LIV., rule 4, enacts that the appeal from the decision of a master to a judge at chambers, "shall be by summons, within four days after the decision complained of." The terms of this rule are complied with if the summons is taken out within the four days and it need not be returnable within them.

In *Bell* v. *North Staffordshire Ry. Co.* (1), a judge sat at chambers within the four days. Not so here. Therefore it would have been useless to make the summons returnable within the four

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(1) 4 Q. B. D. 205.

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days. In *Fox* v. *Wallis* (1) the notice of motion might have been given in proper time but was not.

But, secondly, the time may be enlarged: Order LVII., rule 6, and should have been enlarged, as the appellant was in no default.

Gibbons, shewed cause. The rules prescribing the time for appeals are imperative and are strictly construed. Order LIV., rule 4, and the cases upon it require the summons to be returnable within four days.

Notwithstanding Order LVII., rule 6, the "Court has no discretionary power to deprive a litigant of any advantage given him by the General Orders, unless there has been on his part some conduct raising an equity against him:" per Jessel, M.R., in *McAndrew* v. *Barker* (2); and the Court "ought not to enlarge the time unless under some very special circumstance indeed, that is to say, if there has been any misleading through any conduct of the other side:" *International Financial Society* v. *City of Moscow Gas Company* (3); *In re Mansel, Rhodes* v. *Jenkins* (4); *Krehl v. Burrell.* (5) Moreover the application to enlarge should be made on a summons for that purpose. Order LIV., rule 1.

DENMAN, J. I think that the appeal ought to proceed although the appellant is out of date. Mr. Gibbons says that we ought not to apply the amending rule, first because it is not before us on the the summons, and he referred to the rule enacting that every appeal shall be by summons. But that rule is only applicable to proceedings in chambers and not in court, and I think it would be a most undesirable limitation of the power of the Court to enlarge the time, if the Court were to say, "We never will enlarge it without a special summons taken out at chambers, subject to appeal to the judge, then to the Divisional Court, the Court of Appeal, and eventually the House of Lords." I do not think such was the intention of the rule, but that the intention was that, when the Court has before it an application which is out of time, and sees good cause in justice for enlarging it, they may

(1) 2 C. P. D. 45.

(2) 7 Ch. D. 701, at p. 705.

(3) 7 Ch. D. 241, at p. 247.

(4) 7 Ch. D. 711.

(5) 10 Ch. D. 431.

enlarge it. That has always been the practice and I see no reason for limiting the power. So I think we have power. But it is said that we ought not to enlarge the time, because there are decisions of the Court of Appeal that the time will never be enlarged, unless the other party has been in default and has brought about such a state of things as would make it unjust not to enlarge the time. There are, no doubt, authorities in which it has been laid down, especially by the Master of the Rolls, that that is the principle. But they are all decisions on Order LVIII., rule 15, which applies to a subject-matter not altogether like the subject we have now to deal with. Those were cases of an appeal in some interlocutory proceeding, the time for which was twenty-one days. The subject-matter in this case is an appeal from a master in chambers, and the time allowed for it is four days. A very strict construction, more strict indeed than I should have been inclined to give it, has been placed on that provision, viz., that an appeal is not in time merely by taking out the summons, unless the summons itself is returnable within four days of the master's decision. I think that construction is unfortunate, because of the injustice it may do. But the question is whether that rule is so rigid as to restrain the power of the Court to enlarge the time. Now, in the present case, I think there is good ground for enlarging the time. The summons was taken out for the very first day on which the judge was to sit at chambers, and the parties got their summons returnable on that day. It appears to me that to hold that in such a case as this they were out of time for all purposes would be so unjust, that unless I found a court declaring that under such circumstances we could not extend the time, I should not feel justified in refusing to extend it. It is said that *Bell* v. *North Staffordshire Ry. Co.* (1) is on all fours. But I think it is not, because it appears that there was a judge sitting at chambers within four days from the order, for the order was made on the 23rd of December, and the judge sat on the 27th. In this case there was no such possibility of going before a judge within four days. I understand that Field, J., simply refused to hear the application because he thought himself bound by that case. I think, however, it is distinguishable.

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LINDLEY, J. I am of the same opinion. I take Order LIV., rule 4, and will adopt the construction put on it in *Bell* v. *North Staffordshire Ry. Co.* (1) There the Court were not asked to extend the time but to construe the rule. We, however, are asked to assume that their construction was right and to hear the case although the time has expired. The appellant does not appear to be in default at all. He took out a summons in time. If he had taken out a summons to the letter he could not have obeyed the rule. He has done that which was most in accordance with common sense, for, finding that it would be of no use to make the summons returnable within four days, he made it returnable at the first minute when it would be of use, and I think it would be most unjust not to extend the time when he has done the most sensible thing he could do.

Appeal allowed.

Solicitor for plaintiff: *Ralph Thomas.*
Solicitors for defendants: *Markby, Tarry, & Stewart.*

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(1) 4 Q. B. D. 205.

FOULKES *v.* THE METROPOLITAN DISTRICT RAILWAY COMPANY.

1879
April 2.

Railway—Passenger—Ticket issued by One Company—Train of Another—Negligence—Liability of Carriers.

The defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond station of the South Western Railway Company. Above the booking office at the New Richmond station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Railway a return ticket to Hammersmith and back. The ticket was not headed with the name of either company, but bore on it the words "Viâ District Railway." On his return journey from Hammersmith to Richmond the plaintiff travelled with his ticket in a carriage of a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond station platform, the plaintiff, on alighting there, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—

Held, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the South Western Company.

Affd on appl 5 C.P.D. 157 CA.

ACTION for negligence.

The claim alleged: that 1. The defendants were carriers of passengers by railway between Richmond and Hammersmith for reward.

2. The plaintiff became and was received by the defendants as a passenger, to be carried by them from Hammersmith to Richmond for reward to the defendants.

3. The defendants, in breach of their duty, negligently provided an unsafe and improper carriage for the purpose of carrying the plaintiff, and omitted to provide him with a fit and proper carriage; that is to say, that the floor of the carriage which they provided was of so great a height above the platform at the Richmond station as to render it dangerous and unsafe for the plaintiff to get out of it, and no proper or sufficient step was provided to enable him to do so.

4. In addition to the breach of duty and negligence aforesaid, or in the alternative, the plaintiff alleged that the defendants, in breach of their duty in that behalf, negligently, carelessly, and

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improperly provided an unsafe and improper platform and station at Richmond station; that is to say, that the platform at the Richmond station was at so great a distance below the floor of the carriage in which the plaintiff was a passenger as to render it unsafe and dangerous for the plaintiff to get out of the carriage.

5CPD160

5. By reason of the defendants' breach of duty, negligence, carelessness, and improper conduct aforesaid, the plaintiff, in alighting at Richmond from the carriage in which he was a passenger, fell or slipped forward out of the carriage on to the platform, and was hurt and permanently injured.

By the defence the defendant admitted paragraphs 1 and 2 of the claim, but denied that any such accident as was alleged in the 3rd paragraph happened, or that the defendants were guilty of negligence, and pleaded contributory negligence on the part of the plaintiff.

Reply. Issue.

At the trial before Cockburn, C.J., at Westminster, it appeared that on the 5th of July, 1878, the plaintiff went to the New Richmond station on the London and South Western Railway, and there took a return ticket from New Richmond to Hammersmith and back. The South Western Railway runs from New Richmond to Hammersmith. The line, before reaching Hammersmith, divides into two branches, one of which runs to the Hammersmith Broadway station of the Metropolitan District Railway Company. That company have statutory running powers over the London and South Western line between the Broadway station and New Richmond. The plaintiff travelled by train to Hammersmith. He went thence to London and back. On his return he, availing himself of the return ticket, travelled from Hammersmith in a train of the Metropolitan District Railway Company, and under the management of their servants, to New Richmond station. The carriages were adapted to the Metropolitan District Railway stations, the platforms of which are nearly level with the floors of the carriages, but were not adapted to the New Richmond station, the platform of which was about 2 ft. 3 in. below the carriage floors. The plaintiff was accustomed to travel along the Metropolitan District Railway, but had not previously travelled by a train of that company from Hammersmith to New Richmond station. He arrived at that station at 9.30 P.M.; no warning was given to him of the depth of descent from the carriage to the platform. Getting out of the carriage, he put his foot down, expecting to find a step or footboard to the carriages, slipped a little lower, found no foot-board, and was unable to recover himself, both his legs passed down below the platform, and he fell on to it and was seriously hurt.

Some discussion took place at the trial as to the liability of the defendants; from their answers to interrogatories which were put in by the plaintiff, it appeared that on and prior to the 5th of July, 1877, the defendant company carried passengers by their trains from Richmond to Hammersmith, and vice versâ, but tickets issued at Richmond station were issued by the South Western Railway Company, and not by the defendants.

The Lord Chief Justice told the jury that, assuming for the purposes of the trial that the defendants contracted with the plaintiff, they would be answerable if the jury thought there was negligence in the defendants, and his Lordship asked them, first, whether there was negligence in the construction of the platform relatively to the construction of the carriage, leading to the accident; secondly, whether there was contributory negligence on the part of the plaintiff. The jury found a verdict for the plaintiff, damages 500*l.* Execution was stayed, and a motion made for a rule to enter a verdict for the defendants, or for a new trial. On this motion the defendants, who alleged that they were misled as to their defence by a previous statement made to them by the plaintiff as to the tickets he had taken, read affidavits to shew it, and to explain the position of the two railway companies inter se. In one affidavit the chief clerk to the superintendent of the defendant railway company deposed that the plaintiff had called at his office on the 9th of July, and complaining of the accident stated that he took a single ticket from Richmond to Hammersmith, and then a return from Hammersmith to the Temple, and then a single ticket from Hammersmith to Richmond, and that it was on his return with this ticket that he met with the accident. In another affidavit the managing clerk to the defendants' solicitors said that the defence was prepared on the faith of the aforesaid statement. In a third affidavit, Mr. Forbes, the chairman of the defendant company, deposed that the arrangements between the Metropolitan District Railway Company and the London and South Western Railway Company with regard to the use of the line between Hammersmith and Richmond, and the stations at Hammersmith, were, on the 5th of July, 1877, and still were, inter alia, as follows:—

Each company has a separate station at Hammersmith, some distance from the other, the South Western is called Hammersmith (Grove Road) station, and the District station is called the Hammersmith (Broadway) station.

The whole of the railway between Hammersmith and Richmond, speaking of the Grove Road station as Hammersmith, belongs to the South Western Company, but speaking of the Broadway station of the District Company as Hammersmith, there are thirty-eight chains of District Railway intervening between the Broadway station and the South Western Railway.

The District Railway run over and use the before-mentioned South Western Railway, under the authority of the Metropolitan District Railway Act, 1875, by which it is provided that the District Company may run over and use with their engines and carriages of every description, and with their officers and servants in charge of trains, but only for the purposes of passenger and coach traffic to and from their railway, the portions of the London and South Western Railway from the junction therewith of the District Railway, and the new passenger station of the London and South Western Railway at Richmond. . . . It was further provided by the Act that the District Company in using or traversing the said portions of railway, and the stations and conveniences thereto, should at all times observe the regulations and bye-laws in force on the South Western Railway.

After setting forth the working arrangements between the two companies, the affidavit further stated that the District Company had not, on the 5th of July, 1877, nor had they ever had, any booking clerks or servants of their own at the Richmond station, and every ticket issued at that station was and is issued by the South Western Company, who are the owners and have the entire control of that station and of their railway to Hammersmith, and that the District Company would not receive any part of the toll paid by the plaintiff in respect of his journey from Hammersmith to Richmond.

A rule was granted on the affidavits calling on the plaintiff to shew cause why the verdict found for him should not be set aside and a verdict and judgment entered for the defendants, on the ground that upon the facts proved at the trial the defendants were not liable to the plaintiff in respect of the negligence alleged.

On the argument of the rule affidavits were read, one of which stated that "The booking office at the New Richmond station has two doors facing the station yard. Opposite these two doors are two corresponding doors leading on to the platform. There is a wooden enclosure in the centre of the booking office, with two pigeon-holes placed so as to be convenient for passengers passing in at either door respectively. Over one of the said doors facing the station yard are written the words 'North London booking-office,' over the other facing the station are written the words, 'South Western and Metropolitan booking office, and District Railway.'" Tickets issued from the office were also produced to the Court. One ticket headed "L. & S. W. R.," was for journeying on the London and South Western line only, the other ticket had no heading, but bore upon its face the words "viâ District Railway."

Parry, Serjt., and *A. L. Smith*, shewed cause. First, it was admitted in the pleadings and proved at the trial that the contract of carriage was made with the defendants. The jury found negligence in the performance of the contract, and therefore the plaintiff was entitled to recover. Secondly, if affidavits are admissible, it appears from them that the defendants issue tickets at the Richmond station; and the affidavits made for the defendants shew that the train in which he travelled belonged to the defendants, and was under the control of their servants. Whether the journey was entirely over their own line, or partly over the line of another company under an agreement or running powers, the contract was that due care should be used in carrying the passengers from one end of the journey to the other: *Thomas* v. *Rhymney Ry. Co.* (1); *Great Western Ry. Co.* v.

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(1) Law Rep. 6 Q. B. 266.

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Blake. (1) An action against the South Western Company could not have been sustained: *Wright* v. *Midland Ry. Co.* (2) Thirdly, independently of any contract of carriage, the defendants are liable, because the plaintiff was in the defendants' train by their invitation and consent, and being there, was hurt by their negligence: *Dalyell* v. *Tyrer* (3); *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (4); and see *Austin* v. *Great Western Ry. Co.* (5), as in the case of property destroyed while in the custody of carriers by their negligence, although the plaintiff may not be able to sue on any contract of carriage: *Martin* v. *Great Indian Peninsula Ry. Co.* (6)

Waddy, Q.C., and *Bray*, in support of the rule. The defendants do not issue tickets at Richmond. There is no arrangement with the South Western Railway Company that they should do so. The notice over the booking office is merely given for the convenience of the booking clerk. The defendants are not bound by it. The ticket is evidently that of the South Western Railway Company, and its description of the route, "viâ Metropolitan," shews that the defendants are not the contracting company. Nor is it likely that they should be so in respect of a journey five miles of which is over the South Western and only half a mile along the defendants' line. The contract is with the South Western Railway Company. They were the principals, and the defendants were agents. The South Western Company take the fares. They may be said also to hire the carriages. It was their platform which, by not fitting the carriages, caused the accident. The duty for breach of which this action is brought arises out of contract. That contract being express, none other can be implied: see Addison on Torts, 3rd ed. p. 466. In *Austin* v. *Great Western Ry. Co.* (5), where a young child for whom no fare had been paid by its mother was hurt in a train, and recovered damages from the railway company, the right to recover was based on contract. No case can be cited in which a railway company having made the contract of carriage, an accident has happened on their line, and yet another company has been held

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8 Jur NS 1013

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

(2) Law Rep. 8 Ex. 137.

(3) 28 L. J. (Q.B.) 52. 5 Jur NS 335

(4) 11 C. B. 655; 21 L. J. (C.P.) 34.

(5) Law Rep. 2 Q. B. 442.

(6) Law Rep. 3 Ex. 9.

responsible. If a traveller becomes a passenger on a railway, intending to be a passenger, even although he may not have taken a ticket, a contract may be implied. But here the passenger was travelling under an express contract with another company. And even although the action be framed in tort, it is regarded as arising out of contract: *Powell* v. *Layton.* (1)

[GROVE, J. Suppose the defendants had stopped their train alongside the parapet of a bridge, and invited the passenger to get out there, and he, getting out, fell over the bridge into a river below, would not that be negligence in them?]

Not unless it was wilful wrongdoing. The duty to take care of him arises out of the contract to carry. If the defendants contracted at all, their contract was only to carry the plaintiff from the Temple to Hammersmith. His journey thence to Richmond was under his contract with the South Western.

[LOPES, J. Might there not be two contracts, one with each company?]

It would be strange to have two contracts for the same purpose. In *Thomas* v. *Rhymney Ry. Co.* (2) the company issuing the ticket were sued, although the negligence was that of another. So in *Blake* v. *Great Western Ry. Co.* (3) If the contract was with the two companies, both should have been made defendants.

The invitation to become a passenger was given by the South Western Railway Company, and not by the defendants, who are merely their agents: see *Scothorn* v. *South Staffordshire Ry. Co.* (4)

[LOPES, J. Might not agents be liable for negligence?]

They are liable for misfeasance, but not for non-feasance: Dicey on Parties, p. 143, and the injury to the plaintiff was from non-feasance only. In *Winterbottom* v. *Wright* (5) it was held that the plaintiff, employed by contractors to drive a coach provided by the defendants for the Postmaster-General, could not recover for injuries through the breaking down of the coach, because there was no privity of contract between him and the defendants. So here there was none between the parties to this action.

(1) 2 B. & P. (N.R.) 365.
(2) Law Rep. 6 Q. B. 266.
8 Jur. N.S. 1013.
(3) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(4) 8 Ex. 341. 17 Jur. 214
(5) 10 M. & W. 109.

GROVE, J. The meaning of the rule is doubtful, but I will read it most favourably to the defendants by assuming it to be a rule, first to enter the verdict for the defendants on the ground that there were no facts at the trial to go to a jury as evidence of the defendants' liability, and, secondly, for a new trial upon affidavits. I am of opinion that upon both those grounds the rule should be discharged. From the learned judge's notes themselves it seems to me that there is ample evidence for the plaintiff, and none to meet it on the part of the defendants, and that if we were to confine our attention to those notes the case would not have been arguable. But, to make it so, the counsel for the defendants have shewn from the shorthand writer's notes of the trial that, during a discussion there, some interrogatories answered by the defendants were handed in by the counsel for the plaintiff. Whether they were formally put in evidence is uncertain, but it will be safer to assume that they were in evidence. Mr. Waddy then says, that it was proved by those interrogatories that the tickets of the defendants' railway were issued by the London and South Western Railway Company, and, assuming as I do for the purpose of my judgment, that the interrogatories and answers formed part of the case, and were intended to be produced before this Court, I certainly shall assume that in one sense of the word "issued," the tickets were issued by a person who attends at the station for the purpose of issuing tickets, and was in the service of the London and South Western Company, and not in the service directly, at all events, of the Metropolitan District Railway Company. The affidavit of Mr. Forbes says so and is not contradicted, therefore that fact must be taken as the datum in the case. The ticket was actually issued by the book-keeper at a station which in one sense belongs to the South Western Company, but on the outer part of the station the words "South Western and Metropolitan Booking Office and District Railway" are written.

The question is, were the Metropolitan District Railway Company, the defendants, liable for that which the jury have found to be an act of negligence? [The learned judge stated the evidence of negligence.] I need not say whether if this action had been brought against the South Western Company they might not have been held liable, because it does not seem to follow by any means as a necessary consequence that two parties may not be liable respectively for the same accident. Take the ordinary case of an accident caused by the negligence of a wrongdoer whose master is responsible for it. I do not think it could be said, and indeed it has not been contended, that the person injured might not if he chose bring his action against either the master or the servant. The servant who has caused the accident is not exempt from liability for his negligence because his master will be liable for it. It is however unnecessary to decide the question as to the liability of the South Western Company. Therefore I do not base my judgment upon it. But I base my judgment upon this, viz., that there was reasonable evidence to go to the jury of liability on the part of the defendant company, and I say so, assuming the strongest point which I am asked to assume in their favour, viz., that the persons employed by the South Western Company at the booking office were the persons who issued the tickets. [The learned judge reviewed the facts.]

It is admitted that, if the plaintiff had taken his ticket at Hammersmith station direct, the District Railway Company might have been liable because there would have been a contract with the company, but the defendants say that he, having used the return part of his ticket from Hammersmith to Richmond which is exactly the same, in its effect, as if he had taken a direct ticket (with the difference simply of a small reduction in price in consequence of its being a return ticket), they are not liable because the original contract being with the South Western Railway Company that contract remains to fix the South Western Railway Company with the liability and exempts the District Railway. But I am of opinion that, whatever may be the liability of the South Western Company, on which I pronounce no judgment, here the Metropolitan District Company are not exempted. First, because they have invited or knowingly permitted the plaintiff to enter their carriage, and by that alone they, as I think, undertook to carry him safely and with general caution and reasonable provisions for safety; but, in addition to this, they have invited him to use a portion of their railway by their putting up or permitting the notice over the door, by the form of

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the tickets being different from that of other companies, and by the other circumstances in the case. I think that all these facts are evidence of an invitation and permission to a passenger to travel in their carriages, and that they are therefore bound to keep their carriages and the means of descent from and ascent into them in a reasonable and proper state of safety, and that the mere fact that the ticket was issued by the South Western Railway Company, which in the absence of anything else might be evidence of a contract on which the jury ought to act, does not necessarily exempt the defendants from any contract, if a contract is needed in the case, but, at all events, does not exempt them from the liability which they undertake when they receive a person into a carriage which is under their control.

It was argued by Mr. Waddy that the carriages here were really to be taken as South Western carriages. I find no evidence whatever of any hiring or arrangement under which the Metropolitan Railway are supposed to let out their carriages with their guards, engine-men, and servants. Indeed the affidavit of Mr. Forbes, a deponent for the defendants, and therefore not likely to give evidence against them, is to the contrary. Far from saying that the Metropolitan District Railway hire or let out their carriages to the London and South Western Company, the affidavit shows the District Company to be domini, so far as this is concerned, and to have power to use the South Western Company's line, whether the South Western Company wish it or not, and to use the South Western Company's line with engines and carriages of every description. The affidavit seems to me to be a plain answer to the suggestion that the South Western Company must be assumed to have hired these carriages of the Metropolitan District Dailway Company. Then is there not evidence—reasonable evidence, for a jury—of a contract, and that the Metropolitan District Railway Company for their own purposes carried the plaintiff,—for their own convenience, as Mr. Waddy expresses it, for their own interest as I put it, because I do not suppose that a railway company would run their trains and carriages over five or six miles of railway as a mere gratuity to the public, but doubtless there is some arrangement perhaps of a somewhat complicated character, by which they receive money in certain proportions.

The Metropolitan District Company probably take good care that the expenses of all these carriages and rolling stock are paid, and also that they do not act gratuitously, but gain an accession in the number of their passengers whereby a larger amount of money is acquired. Therefore, in my judgment, there was ample evidence for the jury that the defendants do for reward, or its equivalent, run carriages over this railway and take passengers in their carriages.

Then comes the question whether it is absolutely necessary that there should be an express contract between the parties to make the defendants, or parties in similar circumstances, liable in such an action as this. I incline to the opinion (although I do not think it necessary to base my judgment upon it) that it is not necessary.

In *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (1) the declaration was that the plaintiff at the request of the defendants became and was a passenger in one of their carriages, to be by them safely and securely carried and conveyed thereby, together with his luggage on a certain journey along the said railway. The statement of claim here is that the plaintiff became and was received by the defendants as a passenger, to be carried by them from Hammersmith to Richmond for reward, and therefore in form the declaration in the two cases is almost identical. In *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (1) the plaintiff's ticket had been taken by his master. The action was for loss of goods, and Jervis, C.J., in giving judgment, mentions the admission in argument that if under the same circumstances the plaintiff had sustained the loss of a limb or any other personal injury he alone could have sued, and proceeds, "It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, though he might in respect of the loss of service. But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely. If under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no

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(1) 11 C. B. 655, at p. 662.

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reason why he should not also recover in respect of the loss of his luggage." Then Williams, J., says: (1) "The case was I think put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to shew a contract between the plaintiff and the railway company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett* v. *Radnidge* (2), and ending with *Pozzi* v. *Shipton* (3), establishes that an action of this sort, is in substance, not an action of contract but an action of tort against the company as carriers." That decision given in the year 1851, was in the year 1867 thus referred to by Blackburn, J., delivering judgment on the case of *Austin* v. *Great Western Ry. Co.* (4) "I think that what was said in the case of *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (5) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." Lush, J., and Shee, J., put it upon contract. Lush, J., saying, "I prefer to rest my judgment on the ground of contract. I think there was a contract to carry the mother and child, and that contract operated in favour of each party. The only question is, whether the facts averred in the plea and found by the jury, negative the existence of any such contract as I have mentioned. I think they shew that there was an undertaking to carry the plaintiff." Although so far basing his decision upon a different ground, the learned judge assumes that the undertaking to carry the passenger does in fact amount to a contract. Therefore I venture to say that, quâcunque viâ, either the action will lie without a contract for which *Marshall's Case* and *Austin's Case* are authorities, or, if a contract be necessary, I think there was here evidence, and sufficient evidence to go to a jury, of an undertaking or contract by the defendants to carry for reward and for their own interest, and of permitting the plaintiff to go into their railway carriage for their own purpose, which would be evidence of a contract. A ticket, although that may be evidence, it is not the sole and only evidence of a contract. When carriers take the passenger into their carriage, treat him as a passenger, and probably examine his ticket, these and other circumstances in this case which I need not recapitulate, seem to be ample evidence of a contract to carry safely. *Austin* v. *Great Western Ry. Co.* (1) goes, in some particulars, beyond this case. There the company were bound by their statute to carry children under three years of age, when they were accompanied by their friends, free of charge, and for children above three years of age they were entitled to charge half fare. The woman took a child some two months over three years of age with her into the carriage. She was not guilty of any fraud, but ought to have paid half fare for the child. The railway company were not aware of the child's age and made no inquiry, the child was hurt by an accident and an action brought in which the company were held liable, Blackburn, J., giving the judgment already mentioned, Lush and Shee, JJ., basing their judgments on the contract, but being also of opinion that the company were liable because of their reception of the child and mother into the carriage. That fact seems to have been deemed by Shee, J., enough to constitute a contract, and in the view of Blackburn, J., to make the defendants liable. The peculiarity of the case is that, the terms upon which the railway company undertake the contract were not complied with. The company's contract might have been said to be this: "If you bring a child under three years of age and pay your own fare, we will carry your child for nothing as the statute obliges us to do." But there is no such undertaking to carry a child above three years of age, and therefore, as far as contract goes, if an agreement between the parties is to be assumed, there was no agreement, because the railway company not only did not agree to carry gratis a child above three years old but, if they had known the child was above three years of age, they would not have carried it without payment.

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(1) 11 C. B. at page 663.

(2) 3 East, 62.

(3) 8 Ad. & E. 963.

(4) Law Rep. 2 Q. B. 442, at p. 445.

(5) 11 C. B. 655; 21 L. J. (C.P.) 34.

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(1) Law Rep. 2 Q. B. 442.

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Therefore there was no contract in which both parties were ad idem and both agreed, and yet the Court held that taking the child into the carriage and permitting him to be there a passenger on the railway, although they had made no express contract and would not have done so had they known the circumstances, rendered them as liable as if there had been a contract. I think that is an à fortiori case. In the present case the defendants received the plaintiff knowingly, and the jury have found that they were negligent. I fail to see how they could have come to another conclusion. It is argued that the negligence was in the South Western Railway Company having the platform too low. If that be so, still I do not think that the defendants who, having undertaken to safely carry the plaintiff, brought him to the platform which, as is admitted, they knew was too low, and let him get out there without warning, and be hurt, can be allowed to say that some other person was in fault for not making the platform higher. It seems to me that it was the defendants' duty either to arrange with the South Western Company so as to have a proper platform, or to warn their passengers when they knew, as the defendants did, that there was danger.

Were it necessary to decide this case upon the question of agency, the inclination of my opinion is that the South Western Company were, as regards the plaintiff, the agents of the Metropolitan District Company, and that there was a kind of mutual agency for their mutual convenience, each company undertaking to act when it was most convenient for them to issue tickets for their own benefit and the benefit of the South Western Company. I do not, however, rest my judgment upon that, because I think the affidavits do not shew it, and there was no evidence of it at the trial. In my opinion, there being no reason why the verdict should be disturbed, this rule should be discharged.

LOPES, J. I also think that this rule should be discharged. It was difficult for me at first to understand precisely the meaning of the rule, but it now seems that the question raised is, whether assuming the defendants to have been negligent, there was sufficient evidence of the defendants' liability to the plaintiff, upon which the jury could reasonably act. The counsel for the defendants argued that there was no such evidence and no contract with them. They said that the ticket was not taken from the defendant company, but was issued by the South Western Company. This may be so. It may be that the South Western Company issued the ticket and that they did not issue the ticket as the agent, of the defendant company; but in my view it seems unnecessary for the purposes of this case to decide that point. I will assume in the defendants' favour that no ticket was granted by them, and that the ticket issued was granted by the South Western Company. Was there not evidence before the jury from which they might reasonably infer an undertaking by the defendants to carry the plaintiff with reasonable care and to deliver him at his journey's end, and provide for him reasonable facilities for getting out of that carriage? What is the evidence? The defendants received the plaintiff into their carriage at Hammersmith, in point of fact they invited him to get into it. The carriage in which he travelled was under the control of the defendants' servants. The engine drawing the train to which the carriage was attached belonged to the defendants and passed over at least a portion of the defendants' line. The defendants at Hammersmith might and, in fact, ought to have examined his ticket; and if they thought fit might have prevented him going into the carriage at all. He proceeded in that train of the defendants to Richmond, and there the accident happened. The jury have found that the accident was caused by the defendants' negligence.

It seems to me that there was evidence, and I may say abundant evidence, on which the jury were justified in finding a contract by the defendants to carry the plaintiff with reasonable care and to provide reasonable, fair, and proper facilities for his alighting from the defendants' carriage when he arrived at Richmond. But it is said, if that be so, then the plaintiff might have two remedies, one against the defendant company on their implied contract or undertaking (I do not think it much matters whether we call it a contract or an undertaking, especially after the cases of *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (1), and *Austin* v. *Great Western Ry. Co.* (2)), the other

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(1) 11 C. B. 655; 21 L. J. (C.P.) 34.

(2) Law Rep. 2 Q. B. 442.

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remedy against the South Western Company who issued the ticket. I cannot see any difficulty in that. Take this illustration: railway A. issues tickets for railway A. and railway B. The traffic is sometimes worked by carriages and servants belonging to railway A., and sometimes by carriages and servants belonging to railway B. A passenger takes a ticket from railway A. and gets into a carriage belonging to railway B., drawn by railway B.'s engines, and manned by railway B.'s servants. The passenger traverses some portion of railway B.'s line, an accident is caused by the negligence of railway B.'s servants, and through some defect in railway B.'s carriages not being properly adapted to the exigencies of the traffic. Now, although not necessary perhaps, to go that length for the decision of this case, I think that, according to the authorities, the passenger could sue either railway A. or railway B. He could sue railway A. on the contract arising from the ticket issued by the company to carry him the whole distance with reasonable care or caution, or he could sue railway B. as the immediate authors of the negligence, on the implied contract or undertaking which would arise from his having been received into the carriage, or from his having been invited to go into the carriage of railway B. and become a passenger on the railway.

Rule discharged.

Solicitors for plaintiff: *Faithful & Owen.*
Solicitors for defendants: *Baxter & Co.*

WAGSTAFF AND OTHERS *v.* ANDERSON AND OTHERS.

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May 23.

Shipping—Charterparty—Unjustifiable sale of Goods by Captain at intermediate Port—Liability of Shipowner.

The plaintiffs wishing to send cement and stone from London to Callao, the defendants, on the 24th of June, wrote offering them "room" for it in the ship *F. K. Dumas*, and on the 25th of June the defendants chartered the ship of the owners for a voyage from London to Callao by a charterparty providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; that the ship should be addressed to the charterers' nominees at the port of discharge; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded.

On the 26th of June an agreement was made between the defendants, "acting for the owners" of the ship, and the plaintiffs that the former should receive on board cement and stone at a certain freight from London to Callao and sail on a certain date. Freight to be paid one-half on signing bills of lading, and the remainder on final discharge at Callao.

The cement and stone were shipped, half freight was paid, and the master signed bills of lading making the other half payable at Callao; and the ship sailed, but being damaged by bad weather put into an intermediate port where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them.

The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified:—

Held, that the captain, in selling the goods, was not acting as the servant or agent of the defendants, and they were therefore not liable for the conversion.

Affirmed 5 C.P.D. 171. C.A.

FURTHER CONSIDERATION.

Action to recover damages for the non-delivery and wrongful sale and conversion of goods shipped by the plaintiffs on board a vessel which the defendants had chartered.

The proceedings, facts, and arguments are sufficiently stated in the judgment.

Watkin Williams, Q.C. (*Hannen*, with him), for the plaintiffs, cited in addition to the cases mentioned in the judgment, *Mitcheson* v. *Oliver* (1); *Shipton* v. *Thornton* (2); *Acatos* v. *Burns*. (3)

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(1) 5 E. & B. 419.
(2) 9 Ad. & E. 314.
(3) 3 Ex. D. 282.

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Cohen, Q.C. (*Butt, Q.C.*, and *J. C. Mathew*, with him), for the defendants, cited the following additional authorities:—*Sandeman* v. *Scurr* (1); *Gilkison* v. *Middleton* (2); Machlachlan on Shipping, 2nd ed. p. 387; *Lloyd* v. *Guibert* (3); *Hunter* v. *Prinsep* (4); *Wilson* v. *Dickson* (5); *The Gratitudine* (6); *Notara* v. *Henderson* (7); *Quarman* v. *Burnett* (8); *Tobin* v. *The Queen* (9); *Hingston* v. *Wendt* (10); *Trorson* v. *Dent.* (11)

In reply *Doolan* v. *Midland Ry. Co.* (12); *Hayn* v. *Culliford* (13) were referred to.

Cur. adv. vult.

May 23. DENMAN, J. The plaintiffs in this case were the well-known contractors Messrs. Brassey & Co., and they sued for the value of a cargo of stone and cement which had been shipped on board the ship *F. K. Dumas,* in London, for Callao, and sold in Monte Video under the circumstances afterwards mentioned. The defendants were charterers of the ship under a charterparty of the 25th of June, 1872, which, amongst other things, provided as follows:—It was agreed between the master on the part of owners of the good ship *F. K. Dumas* and the defendants that the ship should perform a voyage from London to Callao; that she should be maintained in her class by the owners while under the charter; that she should receive on board at such loading berth as the charterers might appoint all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require, without prejudice to the charterparty; that the ship should be addressed to the charterers' nominees at the port of discharge; that the ship, being loaded, should proceed to Callao and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted; the total freight to be paid for the use and hire of the ship was agreed at the sum of 2500*l.*, to be paid as follows, against captain's order, viz., by charterers' acceptance payable at ninety days from the ship's final sailing from Gravesend, or in cash at 5 per cent. discount at captain's option; but the owners were to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one-third of the amount of charter; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded.

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(1) Law Rep. 2 Q. B. 86.

(2) 2 C. B. (N.S.) 134; 26 L. J. (C.P.) 209.

(3) Law Rep. 1 Q. B. 115.

(4) 10 East, 378.

(5) 2 Stark. 1; 2 B. & Ald. 2.

(6) 3 Chr. Rob. 240.

(7) Law Rep. 7 Q. B. 225.

(8) 6 M. & W. 499.

(9) 33 L. J. (C.P.) 199, at p. 204.

(10) 1 Q. B. D. 367.

(11) 8 Moo. P. C. 419.

(12) 2 App. Cas. 792.

(13) 3 C. P. D. 410.

Cf S.C. 10 Jur N.S. 1029

On the 26th of June, the defendants Moss & Mitchell (whose acts it was admitted were binding upon the other defendants as well as themselves) entered into the agreement with the plaintiffs set out in the statement of claim, as follows:—"It is this day mutually agreed between Messrs. Moss & Mitchell, *acting for the owners of the F. K. Dumas,* and [the plaintiffs], that *the former* shall receive on board in the London Docks 1000 tons of cement in casks and stone in blocks, at the rate of 30*s.* per ton freight from London to Callao; the ship to receive the cement, &c., about 25th July and to sail about 25th August. The barges as they come alongside shall be immediately discharged, or Moss & Mitchell undertake to pay demurrage on barges. The cargo to be received at Callao as customary. Freight to be paid, one-half on signing bills of lading, less two months' discount at 5 per cent. per annum, and the remainder on final discharge at Callao. Penalty for nonperformance of this agreement, 1500*l.*"

Before entering into the charterparty of the 25th of June, the defendants had written to Messrs. Smith, Sundries, & Co., the plaintiffs' brokers, on the 24th of June, offering "room" in the ship *F. K. Dumas* to Callao for 750 tons of cement and 250 tons of stone at the same rate as that mentioned in the agreement of the 26th.

About 1000 tons of stone and cement were shipped, and the vessel sailed in due course. Before sailing, viz. on the 29th of August, 1872, the master signed bills of lading for the cement and stone, "to be delivered at Callao, the act of God excepted, unto order or to plaintiffs' assigns, on paying freight for the goods 786*l.* 17*s.* 4*d.*"

780*l.* 6*s.* 1*d.* (the half freight, minus the discount of 5 per cent. for two months) was paid by the plaintiffs to the defendants before the ship sailed, leaving the residue, which was the sum mentioned in the bill of lading, to be paid at Callao.

The vessel, having sailed, met with bad weather about the 30th of October, and was obliged to put into Monte Video. A survey took place, and on the 4th of December the cargo was discharged by order of the surveyors, and the stone and cement were landed and warehoused. The ship was condemned on the 17th of January, 1873; and it was admitted that she was properly condemned. A portion of the cargo was sent on to Callao in other vessels; but the master, having made inquiry as to the possibility of obtaining vessels to carry on the stone and cement, without communicating with the plaintiffs, sold the cement on the 7th of February, and the stone on the 28th.

It was agreed at the trial that the only questions for the jury were,—first, whether the sale was justified,—and secondly, the amount of damages; and that, if any other question of fact remained, it should be disposed of by me after argument on further consideration. The jury found that the master was not justified in selling, and assessed the damages at 1445*l.*, and said that if they were entitled to give interest from the date of the sale until the time of the verdict, they should do so. The 1445*l.* was the value of the goods at the time of sale; and I think that, if the plaintiffs were entitled to recover, they were entitled also to the 5 per cent. (that is, to 450*l.*) as fair damages for the conversion, according to the principle explained in *British Columbia Sawmill Co.* v. *Nettleship.* (1)

The defendants proposed at the trial to give evidence of a custom that loading brokers are not liable after the goods are received on board; and it was agreed that, if I should be of opinion that evidence of such a custom would be admissible, I should before giving judgment, either take further evidence as to the existence of such a custom myself, or appoint some one to

(1) Law Rep. 3 C. P. 507, 510.

report to me after taking evidence thereon. This contention was not seriously pressed in the argument on further consideration; and I remain of the opinion I expressed at the trial, that such evidence was not admissible, and that the case must be decided according to the view to be taken of the relation between the parties, to be gathered from the documents in the case, and of the proper inferences to be drawn from the facts proved at the trial.

The defendants' counsel at the trial put in a great many documents to shew that the plaintiffs were for many weeks in correspondence with Smith, Sundries, & Co. about their claim upon the underwriters in respect of the stone and cement in question: but I lay no stress upon this evidence, as it might well be that the plaintiffs, or Smith, Sundries, & Co., might be doubtful as to their rights in a case of this description; and the only real question in the case is, whether, under the circumstances which have occurred, they were entitled to sue the defendants for the unjustifiable sale of their goods by the master, or whether the master alone or the ship-owner was the proper person to sue, which depends, not upon what the plaintiffs or Smith, Sundries, & Co. afterwards thought, but upon what was the relation of the master to the defendants at the time of the sale.

The case was argued very fully and very powerfully before me, and a great number of authorities were cited, many of which, however, it is unnecessary to consider, upon the view I take of the real relation between the parties in this case. On the part of the plaintiffs it was contended that, though the charterparty of the 25th of June did not amount to an actual demise of the ship, yet, inasmuch as the defendants had hired the exclusive use of the ship, they were practically the owners of the ship for the voyage, and that the words in the contract of the 26th of June, "acting for the owners of" the ship, meant "acting for the defendants," and that the contract of the 26th therefore, coupled with the bill of lading, amounted to a contract between the plaintiffs as shippers of the goods and the defendants as carriers from London to Callao; and that the master in selling the goods acted as the servant or agent of the defendants, and they were therefore responsible for his acts. It was contended that, inasmuch as the master, though the sale itself was unjustifiable, was acting within the general scope of his authority as agent for the defendants, and inasmuch as there are certain cases in which a sale of the cargo is justifiable, therefore the sale, though unjustifiable in the particular case, was one for which the defendants were liable upon the principle acted upon in *Ewbank* v. *Nutting* (1) and other cases.

For the defendants it was contended that the contract between the parties was not a contract for carriage, but only an agreement on the part of the defendants that the goods should be received on board the ship, and that room for them should there be found, so that they might be the subject of a bill of lading to be signed by the captain on behalf of the owners of the ship, without any undertaking on the part of the defendants in relation to the actual conveyance of the goods or the dealing with them on the voyage between London and Callao. It was also contended that even the ship-owner would not be liable for the unjustifiable sale of the goods by the master, and that, even if the master was the agent of the defendants for some purposes in dealing with the goods at Monte Video, he was not acting as their agent in *selling* them so as to make them liable for his act.

To this it was answered that, looking at the conduct of all parties, it ought to be held as a fact, or concluded from the facts, that the master was throughout acting for the defendants, both in carrying and in dealing with the goods at Monte Video; and stress was laid upon the fact that what he had done was done in the interests of the defendants, and had to some extent been recognised by them as an act done for their benefit. It was agreed that I should draw any inferences of fact or find any question of fact not found by the jury; and it was suggested that it might be a question of fact whether the master signed the bills of lading as agent for the defendants or the ship-owners. If this be a question of fact for me, I find it for the defendants; and I am of opinion that, notwithstanding the interest the defendants had in the due prosecution of the voyage and conveyance of the goods to their destination, the master in selling the goods was not acting as the servant or agent of the defendants either in law or in fact, Looking at the letter of the 24th of June, 1872, which is headed in print, "Messrs. Moss, Mitchell, & Co., Ship and Insurance Brokers," and sent to Smith,

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(1) 7 C. B. 797.

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Sundries, & Co., the plaintiffs' brokers (in which they merely offer "room" in the ship *F. K. Dumas* at certain rates of freight), and at the terms of the letter of the 26th of June constituting the contract between the plaintiffs and the defendants, I do not think that the latter document binds the defendants to any of the terms of the bill of lading so far as relates to the carriage of the goods or the duty of the master after the goods are once received on board. It appears to me that it merely amounts to a contract that the owners of the ship shall receive the goods on board and enter into contracts by bills of lading to carry them at certain rates of freight, and that the ship shall sail on or about a certain day named, and that the defendants will pay certain demurrage if the barges are delayed. All the other stipulations are on the part of the plaintiffs, who are left to make their own contract with the ship-owners through the master for the carriage of the goods, and who in fact did take bills of lading in the ordinary form from the master, not purporting to act in any other capacity than as master of the ship.

5 CPD 178

If I am right in the above view of the case, it follows that, inasmuch as the master was not the agent or servant of the defendants at all, except to receive the goods on board and to sign bills of lading which should be binding on his owners as to the carriage of the goods, the defendants cannot be held liable for the conversion of the goods at Monte Video.

It was argued for the plaintiffs, that, by the very fact of having entered into a charter such as that of the 25th of June, the defendants became the virtual owners of the ship for the voyage; and the cases of *Newbery* v. *Colvin* (1), *Major* v. *White* (2), *Marquand* v. *Banner* (3), and *Schuster* v. *M'Kellar* (4), were relied upon; and it was argued from thence that the master became the agent of the charterers for arranging all matters relating to the carrying on or not carrying on the goods, even to the extent of selling them, if necessary. But it appears to me that the very terms of the charterparty in this case are against any such liability on the part of the charterers; for the responsibility of the master and owners "to all whom it may concern" for proper attention to the cargo is expressly reserved by the charterparty; and it is provided that the charterers' responsibility under it, except for freight, shall cease on the vessel being loaded.

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(1) 1 Cl. & F. 283, per Lord Tenterden.

(2) 7 C. & P. 41.

(3) 6 E. & B. 233.

(4) 7 E. & B. 704, 724. 3 Jur NS 1320

Such being my opinion as to the relation created between the plaintiffs and defendants in this case, it becomes unnecessary to consider the question whether the defendants would be liable on the ground that the sale, being within the general scope of the master's authority, was binding on the ship-owners. The defendants in my opinion never agreed to occupy the position of ship-owners so as to be responsible for the master's acts after the ship had sailed and before the completion of the voyage, but left the plaintiffs' rights to be wholly regulated by the bills of lading, except in the particulars above explained.

I therefore give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Parker & Co.*
Solicitors for defendants: *Hollams, Son, & Coward.*

May 17.

THE DUKE OF NORFOLK v. THE REV. GEORGE ARBUTHNOT.

Grant — Collegiate Church — Chancel — Dedication — Dissolution of Antient Monastic Priory—Surrender to the Crown—Re-Grant.

The monastic priory of Arundel was suppressed or dissolved in the reign of Richard II. (about the year 1380), and a college consisting of a master or warden and twelve seculars or chaplains was by the king's licence created in its stead. The instrument of foundation contained rules or statutes for the government of the members of the college, and for the services to be celebrated "in ecclesiâ prefatâ."

The church of St. Nicolas Arundel, which, architecturally considered, was one entire building all apparently of the same date, was a "cross-church," with a nave and aisles; a central tower; transepts rather shorter than would be usual in a church of such proportions; and eastward of the central tower and transepts, a chapel (known as the Fitzalan Chapel) occupying the place commonly filled by the parish chancel; a north aisle called the Lady Chapel; and at the north-east corner a room originally a "sacristy," but which had for many years been used as a school-room, and as a place where the elections to offices in the corporation of Arundel were habitually held.

In 1511, disputes having arisen between the college and the corporation of Arundel as to the repair of "ye crosse-partes" or transepts, the bell-tower of the church, the bells and bell-furniture therein, they were submitted for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "crosse-partes" were described as going from south to north "inter chorum et navem ecclesiæ:" and the award of the Earl and Bishop was as follows,—The college are solely to repair the south transept, "quæ cancellus parochialis vulgariter nuncupatur;" the corporation and the parish are solely to repair the north transept and the whole of the nave and its aisles; and the expense of keeping up and repairing the bell-tower, bells, and bell-furniture is to be defrayed by the corporation and the parish on the one part, and the college on the other part, in equal moieties.

In the 26th year of Henry VIII. (1544), the master or warden and chaplains of the college surrendered to the King "totam cantariam sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum, vel procinctum, ac ecclesiam, campanile, et cimiterium ejusdem cantariæ sive collegii, cum omnibus et omnimodis domibus, edificiis, ortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti," &c. And in the same year the King in almost the same identical words re-granted the college and its possessions to Henry Earl of Arundel and his heirs.

Since the surrender and re-grant of 1544 no act of religious worship had taken place nor had prayers been said within the walls of the Fitzalan Chapel, with the exception of the reading of the Church of England burial service over some of the bodies which had been buried there,—those of members of the Duke's family who had abandoned the religion of their ancestors; and during the whole of that time the plaintiff and his predecessors had claimed to exclude and had in fact excluded the vicar and parishioners of Arundel from the whole of the disputed building. An iron lattice-work or grille filling the arch which would be commonly called the "chancel arch," and which apparently was as old as the building itself, and divided the part in dispute from the rest of the structure, was locked on the eastern side (there being no key-hole on the other side), and the key always kept by the Earls and Dukes. Vaults had been made and interments had taken place in the building, both in the Fitzalan Chapel and in the Lady Chapel, at the sole pleasure of the Dukes. No faculty had ever been applied for, no registration had taken place, nor had any fees been paid in respect of such vaults and interments. Against these acts of ownership exercised by the plaintiff's predecessors during more than three hundred years, there was not a single act of ownership proved on the part of either the vicar or the parishioners. The answers returned by successive churchwardens for a long series of years (from 1844 to 1875) to articles of visitation episcopal and archidiaconal, all shewed that they assumed the south transept to be the chancel of the parochial church, and the east end of the south transept to be the east end of the church:—

Held, by Lord Coleridge, C.J., upon motion for judgment, that these facts were conclusive to shew that the building in question was not the chancel of the parochial church of St. Nicolas Arundel, but had always remained the private property of the Duke of Norfolk and his predecessors, and that a legal origin for such possession must be presumed; and that, even if the building in question could be shewn clearly to have been the parochial chancel in the fourteenth and fifteenth centuries, every presumption possible in point of law ought to be made in favour of a possession so exclusive, so old, and so unbroken.

Affirmed by Ct of Appl 5 C.P.D. 390.

STATEMENT OF CLAIM. 1. The plaintiff is tenant in tail male in possession of a piece of land with the building thereon called

S.c. a n Cab 4 Q.B.D. 249.

the Fitzalan chapel, in the parish of Arundel, in the county of Sussex.

2. On or about the 2nd of July, 1877, the defendant, by himself and his servants, broke and entered the said piece of land and building of the plaintiff, and wrongfully pulled down and destroyed a certain wall therein, and divers of the bricks composing the said wall.

3. The defendant threatens and intends to commit similar trespasses and injuries on and to the said premises, unless he is restrained by the injunction of the Court.

The plaintiff claimed 100*l.* damages, and the costs of the action; and an injunction to restrain the defendant, his servants, agents, and workmen from further entering upon the land and building, and from doing further damage to the wall.

The statement of defence and counter-claim, so far as is material, was as follows:—

3. Before and at the time of the alleged trespasses, the defendant was, and still is, vicar, incumbent, and officiating minister of the church of the parish of Arundel.

4. The building mentioned in the first paragraph of the statement of claim is the great chancel or choir of the ancient church of the parish of Arundel, and the defendant, as and being such vicar, incumbent, and officiating minister as aforesaid, was and is entitled to the possession of the great chancel or choir and of the nave of the said church, and also was and is entitled to have free ingress and egress betwixt the great chancel and nave, and also to have the light and air pass without obstruction betwixt the great chancel and nave.

5. The vicar of the said church for the time being has as such always been possessed of the nave of the said church of the parish of Arundel, which nave has also adjoined the piece of land in the first paragraph of the statement of claim mentioned; and the defendant, as such vicar, was, at the time of the alleged trespasses, so possessed as aforesaid. The vicar of the said church has been accustomed to have the light and air enter into the said nave through a certain antient arch and screen, and has always been accustomed to pass through the said arch into and from the said nave. The said vicar has been so accustomed to have such access

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of light and air and such ingress and egress actually and without interruption from time immemorial, or for forty years, or for twenty years, or for a long time before the bringing of this action, and, except in the case of the access of light and air for such period of twenty years, such user has been of right.

6. The user in the last paragraph mentioned establishes the defendant's right to the said access of light and air, and his right to the said ingress and egress, under 2 & 3 Wm. 4, c. 71, or by prescription, or in virtue of a grant or charter now lost of which the former existence is to be presumed or inferred, or otherwise; and the defendant relies on such rights or one of them as a justification for his acts.

[There was a similar justification as " one of the parishioners or one of the inhabitants of the said parish of Arundel."]

10. The plaintiff wrongfully and improperly, and without the consent or authority of the ordinary, or of the defendant, or of the parishioners or inhabitants, erected the wall mentioned in the second paragraph of the statement of claim, across the church at the part where the piece of land in the first paragraph of the statement of claim mentioned adjoins the nave, thereby completely separating the said piece of land from the nave and wrongfully obstructing and interfering with the defendant's possession of the said piece of land, as and being the great chancel and nave, and the defendant's right to free ingress and egress and the passage of light and air betwixt the said piece of land, as and being the great chancel and nave, and the passage of light and air through the said arch and screen.

11. The defendant, because the wall so obstructed and interfered with some or one of the rights hereinbefore claimed by him, necessarily pulled down and destroyed the wall, or part thereof, doing no unnecessary damage in that behalf; which pulling down and destroying were the trespasses complained of.

The defendant claimed by way of counter-claim:—1. 100*l.* damages in respect of the wrongful erection and continuance of the said wall by the plaintiff. 2. An injunction restraining the plaintiff from continuing the wall or so much thereof as hindered or obstructed any of the rights claimed by the plaintiff, and ordering the plaintiff to remove the wall or such part thereof as aforesaid, and to restore the church and the site of the wall to the condition in which they were before the plaintiff began to build the said wall.

The plaintiff, in reply, set out the provision against alienation contained in an Act of 3 Car. 1, for the settlement of the family estates of the Earls and Dukes, and denied that the building in question was the great chancel or choir of the parish church as alleged, or that the defendant or the parishioners of Arundel possessed or had exercised the rights claimed therein. Issue thereon.

The cause was tried before Lord Coleridge, C.J., on the 25th of March, 1879, and was argued on motion for judgment on a subsequent day by *Dr. Stephens, Q.C.* (with whom were *C. Bowen* and *W. Phillimore*), for the plaintiff, and by *Charles, Q.C.* (with whom was *Jeune*), for the defendant.

The contention on the part of the plaintiff was, that the building in question, the Fitzalan Chapel, at the east end of the church of St. Nicolas Arundel (in the position usually occupied by the chancel), was and always had been the sole and exclusive property of the Duke of Norfolk and his ancestors, and that the parish church of Arundel was confined to that portion of the building which constituted the south transept, with its aisles. Besides a large body of documentary evidence, all of which is fully considered and discussed in the judgment, the following authorities were referred to,—*Griffin* v. *Dighton* (1); *Rich* v. *Bushnell* (2); *Churton* v. *Frewen* (3); *Chapman* v. *Jones* (4); *Kempe* v. *Wickes* (5); 1 Phill. Eccl. Law, 160.

On the part of the defendant it was contended that the building in question was and always had been the chancel of the parochial church of St. Nicolas Arundel; and the following authorities were cited:—*Warrick* v. *Queen's College, Oxford* (6); *Ritchings* v. *Cordingly* (7); *Durst* v. *Masters* (8); *Carr* v. *Mostyn* (9); *Bright* v. *Walker.* (10)

Cur. adv. vult.

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(1) 5 B. & S. 93, 108.

(2) 4 Hagg. 170.

(3) Law Rep. 2 Eq. 634.

(4) Law Rep. 4 Ex. 273.

(5) 3 Phill. 264, 295.

(6) Law Rep. 10 Eq. 105; 6 Ch. App. 716.

(7) 3 A. & E. 113.

(8) 1 P. D. 373.

(9) 5 Exch. 69.

(10) 1 C. M. R. 211.

LORD COLERIDGE, C.J., delivered judgment as follows:—

This is an action of trespass for breaking down a wall built on the plaintiff's land. The defendant is the vicar of the parish of Arundel; and he pleads, in substance, that the wall was built so as to obstruct his right of entrance into the chancel of his church, and to prevent the passage of light and air from the chancel to the church, and that he broke down the wall because it obstructed and interfered with his rights. The case was tried before me without a jury, and I reserved my judgment on the conclusion of the hearing, rather because of its interest and importance than that I had any serious doubt as to the view which it is now my duty to express.

Its interest and importance, however, are rather in the past than for the future; and arise chiefly out of the ancient institutions and great historical families of which during the evidence and the arguments we heard so much. The principles of decision are simple and familiar; and, whether I apply them rightly or wrongly can be of little consequence except to the parties to this particular proceeding; for, the facts of this case are, as far as I know, peculiar. Neither my own limited knowledge nor the far wider learning and research of the able counsel engaged in the argument have furnished me with any case exactly in point, or even with one in which the circumstances are so far analogous as to afford me either an authority or a guide. I have also received many communications since the hearing of the case from a great variety of persons, which I have not sent to the parties in the action before me, only because they had no real bearing upon the case, being no more than statements of what the writers supposed to be the legal rights of persons in respect of other chapels in other churches under other circumstances. I did, indeed, at the close of the hearing invite, not further argument, but further information on one definite point, viz. whether an integral portion of any church (the church being one and undivided, considered architecturally,) had ever itself been called in any authentic legal or historical document, not chancel, or chapel, or chantry, or choir, or aisle, but *church*. It was perhaps unwise to invite any communication after the close of a full and deliberate argument; but, though I have received various papers, they have none of them

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been confined to this definite point, nor has any one conveyed to me the information I desired. It was not a matter decisive of the case, though it leaves the interpretation of one interesting document conjectural or doubtful. I proceed to state what I conceive to be the fair effect of the documents and facts proved before me; and, if these are accurately set forth, the conclusion almost inevitably follows.

It is not very clear what were the relations between the parish of Arundel and the small monastic body which at the time of the Norman Conquest or very soon after that event was undoubtedly established there; nor, except as matter of antiquarian curiosity, is it at all important to ascertain them. It is indeed clear that they were rectors of the parish and performed the sacred offices in the parish church of Arundel then as now dedicated to St. Nicolas. But the real history of the case begins with the foundation of the College of Arundel by Richard Earl of Arundel and Surrey in the third year of Richard II., A.D. 1379 or 1380. I mention, to shew that I have not forgotten, but I do not think it the least necessary here to comment in detail upon the inquisition of the 3rd Richard II., which forewent the licence of the King. The licence of the King to the Earl for the foundation, the instrument by which the Earl founded, and the statutes by which he ordered the government of the college, are all preserved. The licence is in Dugdale, the other documents are preserved in the registry at Chichester, and have been produced before me. The monastic priory was suppressed, dissolved, or annulled (*adnullare* and *adnullatio* are the words used); at any rate, it ceased to exist; and a college consisting of twelve seculars called chaplains and a master or warden was created in its stead. Both in the royal licence and in the instrument of foundation the priory is said to have existed "*in the parochial church of Arundel,*" (1) and "*in the parochial church of St. Nicolas Arundel.*" (2) The Earl is impowered by the licence to give a name to the *College;* and, when he founds it, he says it is to be "ad honorem Omnipotentis Trinitatis, Patris, Filii, et Spiritûs Sancti, ipsius Ecclesiæ jam *patroni,* Gloriosæ Virginis Mariæ omniumque sanctorum." The 7th chapter of the statutes,—it being recited that the college "in

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(1) Deed of Foundation.

(2) Royal licence.

Ecclesia prædicta" (i.e. the parish church of St. Nicolas) "ad augmentationem Divini cultus pro noto sit astrictum,"—goes on to enact that the members of the college are to reside "in ipso collegio," and are never to absent themselves "a quibuscunque officiis Divinis in *eâ ecclesiâ* observandis." It enacts further in great detail the duties of the members in respect to the divine offices, so that the offices "in ecclesiâ præfatâ provisius et honorificentius celebrentur;" and, further, that none of the members of the college shall go to perform service "ad ecclesias convicinas," manifestly neighbouring parish churches, except in certain cases specified in the statute. The 8th chapter makes provision for the celebration of divers masses,—one, "magna missa," "in magno altari," another, "missa de Gloriosâ Virgine," "ad summum altare" till a special altar for the Virgin shall be provided,—and other masses all to be celebrated "in dictâ" or "in eâdem ecclesiâ." It is also provided that, on certain occasions, "post magnam missam in *cancello* celebratam," certain psalms and prayers shall be recited in the *choir*,—"chancel" and "choir" being used apparently as synonyms. And, further, that certain masses shall be celebrated "ad diversa altaria" so that the parishioners "dictæ ecclesiæ" and others may hear them. So far is the language of these documents.

It appears further that the whole fabric as it stands now is of substantially the same date, and was probably all built continuously, with no break between the building of one portion and another, at the close of the 14th or the very beginning of the 15th century. It appears also that the iron lattice-work or grille filling the arch, which would be commonly called the chancel arch, is as old as the building, and that the lock and key in it are of the same date.

It may be convenient shortly to state that the church, regarded as one building, is a cross church, with a nave and aisles; a central tower; transepts rather shorter than would be usual in a church of such proportions; and, eastward of the central tower and transepts, the disputed building consisting of a long and beautifully proportioned chapel occupying the place commonly filled by the parish chancel; a north aisle called, and no doubt rightly called, the Lady Chapel; and at the north-east corner a room probably originally used as a sacristy, now disused, but which, as will appear in more detail by-and-bye, was for many years used as a school-room, and as the place where the elections to the office of mayor certainly, and I think to other offices in the corporation of Arundel, habitually were held.

I am of opinion that the church spoken of in these documents is the whole parish church of St. Nicolas Arundel, including what is now used by the parish, and what is claimed by the Duke of Norfolk. Speaking only, as only I can speak, as a man of ordinary education and experience, I cannot help knowing that there are numerous instances in different parts of England of churches still called collegiate, which were before the Reformation the churches of colleges of secular priests, which were also the churches of parishes of which these colleges were rectors, the freeholds of which churches were in the colleges in the sense in which the freehold of any church is in an ordinary ecclesiastical rector, and in which the parishioners had certain rights and the colleges had certain other rights,—rights co-existing and not conflicting; which churches were nevertheless one not two, and that not merely architecturally and to the eye, but really and in law.

We shall see as we go on whether the documents shew that in after time it was different; but, at and soon after the foundation of the college, I do not at all doubt that, if it had been asked what was the parish church of Arundel, the present church of St. Nicolas in its architectural integrity would have been pointed out; and, if it had been asked what was the church of the college of the Holy Trinity of Arundel, the questioner would have been shewn the very same building in its architectural integrity; yet, as the grille shews, the college practically had the exclusive use of the part eastward of it, the parishioners as a rule had the use only of the nave with its aisles and of the transepts. It may be that, as we were told by a very great and learned architect, the pulpit in the nave, and the high altar at the extreme east end of the church, which was in view from the pulpit, were, as he phrased it, "worked together;" meaning, I suppose, that, as the preacher could see the high altar, he might, and perhaps did, direct the attention of his hearers to it and to the sacred elements upon it. But the existence of the iron-work filling the whole arch, a circumstance admitted to be most unusual, seems to me to shew that there may have been a reservation to the college and to its members only of that part of the church which was eastward of the iron-work. That the Earl of Arundel who founded the college and built the church might, if he pleased, so distribute his gift between the college and the parishioners is, I think, quite clear. There is nothing in the documents I have examined to shew that he did not. Is there anything in those which follow? Certainly not, in my opinion, in the will or wills of Earl Thomas, executed in 30 Hen. 5, A.D. 1415, not many years after the foundation of the college and the building of the church. He desires to be buried "in our *college* of Arundel before the high altar;" and, again, "in the choir of the *college* of the Holy Trinity of Arundel." Neither of these expressions appears to me to mean, nor to be even capable of meaning, that the building now claimed by the Duke of Norfolk *was* the college, which it certainly was *not* either in 1415 or at any other time; both of them appear to me to imply that, in 1415, this building was a part of the college in the sense that either it belonged to the college or was at least a building in which the college had peculiar and perhaps exclusive rights.

I do not think that anything is to be gathered from the admissions by the Bishops of Chichester to the vicarage of Arundel and to the mastership of the college of Arundel, several of which to each office between the years 1405 and 1528 have been put in evidence. They shew that there was besides the rectory a vicarage of Arundel, to which the college presented and the bishop instituted, sometimes a member of the college and sometimes not. But this shews nothing, and the instrument by which the vicarage was created, and which might possibly have shewn something, does not exist, or at any rate has not been produced.

But there is a document of 1511 to which both sides have appealed,—the Duke as shewing that at that date the building he now claims belonged absolutely to the college and that the parish had no rights therein,—the vicar of Arundel as shewing that this building was then really the great chancel of Arundel church; and he thence contends that, if this was so in 1511, nothing has since happened to deprive it of its character. The document is curious. It appears that in 1511 there had been disputes between the college and the corporation and parish of Arundel as to the repair of "y^{e} crosse partes," or, as we should now say, the transepts, the bell-tower of the church, and the bells and bell-furniture therein; and that all parties had agreed to submit the matters for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "crosse partes" are described as going from south to north "inter chorum et navem ecclesiæ:" and the award of the Earl and Bishop was as follows: The college are solely to repair the south transept, "quæ cancellus parochialis vulgariter nuncupatur;" the corporation and the parish are solely to repair the north transept and the whole of the nave and its aisles; and the expense of keeping up and repairing the bell-tower, bells, and bell-furniture is to be defrayed by the corporation and parish on the one part and the college on the other part in equal moieties. I do not notice the temporary provision as to the key, as it applies to the bell-tower only.

Such is the effect of this document; and it appears to me to make out with tolerable certainty several propositions. First, that in 1511 the whole building was commonly spoken of as one church. Next, that the parish did at that time in fact use the south transept as their chancel, and that the south transept was commonly called the parish chancel. Next, that at that time in fact the building now in dispute was not *used* as a chancel by the parish, and that the high altar of the parish was not then there. Next, that the college were charged with the repair of the parish chancel as well as with that of the disputed building and of the Lady Chapel, because, being rectors, it was equitable that they should repair what was in fact the chancel of the parish. Next, that, the nave and aisles and north transept being in fact the portion of the entire church used by the parish other than their own chancel, it was fair that the parish should repair them. Lastly, that, the bell-tower and the bells therein being used alike for the college services and for the parish services, the college should bear half of that expense the whole of which in ordinary cases would have been borne by the parish. Such appears to me to be the evidence of fact supplied by the award; and I think it is strong evidence to shew that the distribution of the building between the college and the parish which might have been made by the Earl who founded the college and built the church, was made by him in fact and was existing in practice some one hundred and thirty years after his foundation.

Then we come to the surrender of the college to Henry VIII., and the re-grant by Henry to the Earl of Arundel of that date. These are interesting documents apart from their bearing on the case; for, the ecclesiastical Latin in which the surrender is written appears almost unable to express the absolute willingness and eager self-sacrifice with which the members of the college stripped themselves of all they possessed, and reduced themselves to beggary, without any pressure whatever from their most illustrious and invincible prince and lord Henry VIII. Recent history teaches us to believe implicity the absolute truth of such statements in such documents from such persons at such a time; and no statements certainly can be stronger. The master or warden and the fellows of the college or chantry of the Holy Trinity of and in Arundel surrender to the King "totam cantariam sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum vel procinctum, ac ecclesiam campanile et cimiterium ejusdem cantariæ sive collegii, cum omnibus et omnimodis domibus, edificiis, ortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti." They then surrender their whole property real and personal to the sole use of the King, his heirs, successors, and assigns; and at the conclusion of the document they warrant and assure to the King, inter alia, "dictam cantariam sive collegium nostrum, ac etiam totum scitum, fundum, circuitum, ambitum, et procinctum, mansionem et ecclesiam nostram prædictam, ac omnia et singula maneria," and so forth.

Much reliance was placed by the counsel for the defendant upon the word *ecclesia* in the beginning and end of this surrender, as shewing that the college surrendered to the King the disputed building only; for that, as the parish church did not belong to them, they could not surrender it. But they had a certain property in the parish church, as they had in the churchyard, and what they had they surrendered. They had other rectories and benefices belonging to them in the counties of Sussex and Southampton, and these they speak of and surrender as "ecclesias nostras prædictas," in the plural, shewing that they used "church" in its popular and ordinary sense, and that, where they possessed an advowson or a presentation, they spoke of the church connected with such advowson or presentation as their church. I think there is no ground whatever from the language of this surrender for contending that at the date of it the architectural whole of the parish church of Arundel was divided into two churches; and that under the term "ecclesia" only the building now in dispute was intended to be or was in fact surrendered.

I pass to the re-grant of the college and its possessions (together with other properties) by the King to the Earl of Arundel in the same year as the surrender. The King grants to the Earl "totum scitum, fundum, ambitum, circuitum, et procinctum nuper ecclesiæ collegiatæ sive collegii Sanctæ Trinitatis de Arundel in comitatu nostro Sussexiæ; alias dictæ nuper collegii sive cantariæ Sanctæ Trinitatis de vel in Arundel in comitatu nostro Sussexiæ modo dissolutæ. Ac ecclesiam campanile et cimiterium ejusdem nuper collegii sive cantariæ. Ac etiam omnia et singula messuagia, domos, * * * infra scitum, ambitum, circuitum, et procinctum dictæ nuper ecclesiæ collegiatæ collegii sive cantariæ prædictæ existentes aut dictæ nuper ecclesiæ collegiatæ collegio sive cantariæ aliquo modo dudum spectantes sive pertinentes; ac parcellum possessionum et reventionum ejusdem ecclesiæ collegiatæ collegii sive cantariæ dudum existentes." I have set out this somewhat long passage in detail to shew that in this document collegiate church, college, and chantry, are used over and over again as simple synonyms. They are used in a precisely similar collocation at least a dozen times more in the course of the grant, and always in a like sense.

It was argued, as I understood, that in the grant the word "ecclesia," in connection with campanile et cimiterium might mean, and that in truth they did mean, the building now in dispute, and not the whole church in its architectural integrity. But I think the argument untenable. The King is careful (see p. 6 of the printed grant) to grant to the Earl only what the college surrendered to him, and professes to grant no right or estate in the granted premises except the right or estate of the college.

I have said already that the college did in my judgment grant the whole church to the King, i.e. according to their estate and right in it, as part of their property; and I have given my reasons for so thinking. If therefore the college granted it in any sense to the King, in that sense the King granted it to the Earl. The language also fairly considered appears to me to lead to the same result. The church of the *college* I could understand being at least possibly the disputed building; but the church of the collegiate *church*, the church of the *chantry*, must mean in my judgment the church of the corporate body called by these various names, i.e. the church of which the advowson was in them, the freehold of which and of the churchyard was in them, i.e. the whole undivided church of St. Nicolas Arundel, in which the college and the parish had the respective rights which I have already indicated. The grant of the bells and lead, amongst a variety of other goods and chattels, makes no difference; and I mention it lest I should be thought to have overlooked it.

The estates of the Earl of Arundel, and amongst them what had been granted by Henry VIII., became forfeited to the Crown by the attainder of the then Earl in the reign of Elizabeth. They were re-granted to Thomas Earl of Arundel by James I., in the second year of his reign. There is nothing in the language of the grant of James I. which calls for observation. In the third year of Charles I. a private Act of Parliament settled certain estates inalienably upon the then Earl of Arundel and his heirs, and, in default of heirs male, upon Lord William Howard and his heirs male,—the present heir male being the Duke of Norfolk, the plaintiff. The value of this Act is only as a piece of evidence respecting the names which certain things bore at the time when it was passed; for, it grants nothing; it only settles and assures what was already the Earl's. But it is to be observed that it treats as property and as subjects of settlement things the property in which and the rights in respect of which were of very various sorts. It settles, for instance, the borough of Arundel, the manor of Arundel, the rectorie of Arundel, the forest of Arundel, the college house called the college of Arundel, the almshouse of Arundel, with a great multitude of other things, each, it is to be assumed, according to the estate and interest which the Earl of Arundel then had in them respectively. A sum of 210*l.* a year is reserved out of certain properties, to be paid to the Fishmongers' Company in London, to be by them expended in repairing "the castle of Arundel and the chapel adjoining to the church of Arundel wherein some of the Earls of Arundel lye buried;" and some reliance was placed in argument upon these last words. But they are, after all, a description only in a private Act of Parliament; and, though I do not at all doubt that they describe the building now in dispute, they do not by themselves shew its legal relation to the church, still less do they ascertain whether this chapel was then used as a chancel, as it might have been, or whether it was then as it had been for many years practically separated off from the rest of the building. And no evidence was given before me, either from the Fishmongers' Company or otherwise, to shew that the sum mentioned in the Act of Charles had been or was still paid to the company, or on what part of the whole fabric, if on any part, the money had been or was expended by the company if they received it.

This ends what may be called the documentary title to this building. There is no language in my opinion in any part of it conclusive either for the plaintiff or the defendant. The founder may have intended to grant to the college the exclusive use of so much of the church as lay eastwards of the transept. His language is at least patient of such an interpretation; and the award of the Bishop and the Earl in 1511 is at least some, I think myself it is strong, evidence to shew that the usage of many years had at that time so interpreted it. Whatever the college had from the founder passed from Henry VIII. to the Earl of Arundel, and from Henry Earl of Arundel to the Duke of Norfolk. If the words of grants are ambiguous or vague (I say, if they are so, because in my opinion the words here are plain enough), it is common law and common sense to have recourse to the evidence of fact to explain them. What have been in fact the rights enjoyed ever since the Reformation in respect of this building by the Earls of Arundel and their successors the Dukes of Norfolk? The answer must be, the most absolute rights of ownership which, regard being had to the nature of the property, were ever proved in a Court of justice. I confess that, when I sat to try this cause, knowing nothing about it but what the pleadings disclosed, and having passed a day at Arundel endeavouring to get into my mind a clear view of the buildings and of their surroundings, I fully expected that there would be disputed or conflicting facts, that at the least there would be some things proved which would call upon the plaintiff for careful explanation. But there is scarcely a fact proved by the plaintiff which has been disputed; scarcely anything which can be called a fact proved on the part of the defendant.

I proceed to state some of the facts of ownership, most of them undisputed, all established before me by the clearest proof. Since the surrender of the college to the King in 1544, no act of religious worship has taken place within the walls of the disputed building, with the exception of the reading of the Church of England burial service over some of the bodies which have been interred therein,—an exception which I will separately notice. No prayers have been said; no Holy Communion has been administered. During the whole of that time the plaintiff and his predecessors have claimed to exclude and have in fact excluded the vicar and the parishioners from the whole of the disputed building. The iron lattice-work was locked on the eastern side, and the Earls or Dukes have kept the key. In the fact that the lock was on the eastern side there is nothing: but it is quite otherwise as to the custody of the key. There are other entrances to it, and of those likewise the keys have been kept in the same custody. In 1858, the key, not of the lattice-work, but of a door, was lent by the then Duke to the then vicar; but after a while it was reclaimed by the Duke and returned by the vicar. Vaults have been made and interments have taken place in the building, both in that part of it which has been called the Fitzalan Chapel, and in that part which no doubt was the Lady Chapel, at the sole pleasure of the Dukes. No faculty has been applied for, no registration has taken place, no fees have been paid in respect of such vaults and such interments. Further, the Dukes have at their pleasure disinterred bodies in this building, and have changed the places of their sepulture, without any faculty being obtained for the purpose.

These are acts done by the predecessors of the plaintiff, and done during more than three hundred years, with nothing to set against them. The utter neglect of this beautiful and interesting building by the same line of owners is almost equal proof of the absolute character of their ownership. It is, no doubt, the privilege of an owner to let his property fall into decay; a privilege of which former Dukes of Norfolk have availed themselves in respect of this building to the utmost extent. A hundred years ago, as a print of that date shews, there was a rich carved roof which, whether it was removed or fell down, at any rate no longer exists. There are costly and noble monuments of the Fitzalans, amongst them a singularly rich and splendid alabaster altar tomb with two recumbent figures on it, all in a state of dirt, neglect, and mutilation, which families far less illustrious than those of Howard and Fitzalan seldom allow to exist in the monuments of their ancestors. It was proved also that the building had been used as a lumber-room and as a workshop; and that the access to it which was denied to the vicar and parishioners, was freely granted to the owls and bats. There may have been reasons why this state of squalor and ruin was permitted, of the weight of which I am no judge, for I do not know them; but, certainly, a stronger assertion of an absolute right of property in a patron of an ecclesiastical building than to exclude every one from it, to treat it as a store-place for tools and ladders, and to suffer it to become almost a ruin, can hardly be conceived.

It is quite true that from time to time members of the family of the Dukes of Norfolk have been buried in the disputed building, whose burials are registered, or who appear to have been buried with the rites of the Church of England; and that in these latter cases the body has been borne into it from the nave of the church through the iron lattice-work and the service said there by the vicar or some English clergyman representing him. The registers from 1691 to the present day contain the registry of sixteen burials of the Norfolk family; and of these seven appear to have taken place with Church of England rites, the earliest of this latter class, at least so far as the registers afford evidence on the subject, in 1824. But, first, this has been the exception, not the rule; and, whereas the rule is very difficult to explain, except upon the view of the case presented by the Duke: the exceptions are readily capable of an explanation, which renders them of little weight in favour of that presented by the vicar. Every time that the Duke buried without service, or built a vault, or removed

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bodies in this building,—especially since 1847, when the church of Arundel was closed against burials by Order in Council,—he was, unless the building belonged to him, breaking the law and defying ecclesiastical authority. But, as to the burials within it with Church of England rites, some of the bodies may have been those of Protestants (for, there have been Protestants in the Howard family) or of Roman Catholics either who had had no objection in their lives, or as to whom their kinsmen had no objection after death, that the Church of England service should be read over their remains. This state of feeling is in fact not uncommon in the old Roman catholic families in England; and the fact, therefore, that such burials as I have mentioned have taken place, though proper to be noticed, cannot countervail the weight which attaches to the length and prevalence of the contrary practice.

While such has been the assertion of property in respect of this building for more than three hundred years on the part of the Duke and his predecessors, and such the user to which they can point in support of the legality of what they assert, what has been the conduct on the part of the vicar and the parishioners? Absolute acquiescence is an expression hardly strong enough to be applied to it. This, indeed, there has been. No vicar has asserted any right; no bishop or archdeacon has attempted to exercise any authority; no churchwardens or parishioners have ever made any claim, till a very few years ago, in respect of this building. But this is by no means all. Articles of visitation both episcopal and archidiaconal have been put in before me, ranging from 1844 to 1875. In these articles questions are asked as to the state of repair of the church "*as well the chancel* as the body thereof." The answers are "good," "very good," "excellent;" and this at a time when the utter squalor and total disrepair of what is now claimed as chancel was notorious and has been proved. Questions are asked as to the existence of the Tables of the Ten Commandments "*at the east end of the church according to the canon.*" The answers are, that they exist, that they are in excellent order; in one instance "quite a pattern" is the parochial language. This at a time when according to the present contention the east end of the church was ruinous, and there were no commandments on it according to the canon. In more than one instance, they are expressly said to be in *the chancel.* All these answers shew conclusively that the vicar and churchwardens treated the south transept as the chancel; and that, if they ever heard of, they expressly abstained from giving any countenance to, the contention of the present defendant.

In two instances alone is there some trace to be found of the present contention. In 1850, the churchwardens state, in answer to the question as to the state of repair of the church and chancel, that the church is in good repair, "but we have nothing to do with the chancel." In 1865, the churchwardens at first state that the chancel as well as the body of the church is in very good repair: but, as to the Ten Commandments, they say that they are "set up in the chancel (so called) over the Communion Table, but the chancel proper has been usurped by the Duke of Norfolk;" and, in answer to the question whether there have been interments recently within the walls of the church, they say, "No: the *last* interment was in the chancel claimed by the Duke of Norfolk now as private property." These answers are signed by Mr. Holmes, a highly respectable and intelligent solicitor, who was a witness before me, and who appears to have been one of the churchwardens of Arundel for a great many years. But this is the only instance in which this claim appears while he was churchwarden. Both before and *after* 1865, he signs answers in the ordinary form, which assume the south transept to be the chancel of the church, and the east wall of the south transept to be the east end of the church. He said indeed, that he signed these answers without much thought; but that can hardly be so as to the answers of 1865; and, as to the others, I must observe that they do not all follow one form of words, that the language of them is occasionally individual and characteristic, and that, if it were otherwise, those who sign formal and important documents of this kind cannot escape from the fair effect of their language by saying that they used it carelessly; and, further, that, if the claim now put forward had been persistently made in the answers to these articles, I should undoubtedly have heard much as to the great weight to be given to these answers from the learned and able counsel for the defendant. The answers which I have noticed in 1850 and 1865 do indeed shew that at those dates some of the parishioners at least held opinions in favour of the claim now put forward by the vicar; but, as nothing was done, at the furthest and the utmost they shew no more. I have had no articles proved before me of an earlier date than 1844; but, as far as they go, and making due allowance for the two exceptions I have noticed, the weight of evidence to be deduced from them is entirely in favour of the Duke and against the vicar and the parish. If, therefore, I felt bound to say, as I did, that the evidence of the acts done by the Duke's predecessors was almost as strong as evidence could be in favour of the plaintiff, I am bound to say further that the evidence afforded thus far by the conduct of former vicars and parishioners is almost as strong as evidence can be against the defendant.

There is a transaction of the year 1848, between the Duke of Norfolk and the corporation of Arundel which, and the building in relation to which it took place, it is necessary to notice. At the north-east end of the Lady Chapel there is a small building connected internally by an ancient passage with the Lady Chapel, which it seems agreed was used before the Reformation as a sacristy. Down to the year 1848, at least to within twenty years of that date, but *from* what point of time was left uncertain, it was shewn to have been used as a school-room, and as the place where elections to offices in the corporation of Arundel had annually been held. In or about 1848, the Duke had turned a road, had given a piece of ground to the churchyard, and had built at considerable expense the present Town Hall of Arundel; and by a mutual conveyance in 1848, the Duke conveys certain premises to the corporation, and the corporation, "as far as they lawfully or equitably can or may, convey to the Duke, inter alia, the old school or court house and the site thereof." I do not myself think this transaction of any great importance. It is barely thirty years ago. The cautious and hesitating language of the deed seems to shew great doubt on the part of those who advised the corporation whether the corporation had any such right or property to convey, and whether, if it had, it could now by such an instrument convey it. As far as it goes, however, the inference to be gathered from the transaction is in favour of the plaintiff. No one except the corporation appears to have claimed any right in this building against the

Duke; and, if it did belong to the corporation, then it is another instance of an integral part of an ecclesiastical building having in times long beyond living memory become the property of laymen, and having been used for purposes wholly secular and entirely alien from those to which in the time of the college it had in all likelihood been devoted.

Why should I hesitate to give its natural effect to evidence such as I have described? It has been argued that the Dukes of Norfolk were great and powerful noblemen, and that, as the vicar and parishioners of Arundel had no power to contest their usurpations; so acquiescence in these usurpations is not to be used as evidence of their legal origin. I do not know that, as judge of law, or as in this case of fact, I can, or that if I can I ought so to deal with such evidence as this. But the argument, whatever it may be worth, is I think completely met by the fact that, if the Howards were a powerful family, as in one sense no doubt they were, they were also a family belonging, not indeed exclusively, but on the whole and generally, to a religion for many long years proscribed and persecuted. Their ecclesiastical patronage, if Roman Catholics, was exercised by the Universities; they were, if Roman Catholics, the objects of a penal legislation which is to be found described in the burning words of Mr. Burke (1), and which I take the freedom to say was a disgrace to a civilized country; and I cannot and do not believe in fact that, if this building had belonged to the parish of Arundel, there would have been no attempt on the part of any vicar or parishioners to revindicate it, none on the part of any Bishop of Chichester or Archdeacon to exercise any authority within it, claimed and held as it was by Roman Catholics during so many years of the centuries which rolled by from the time of Queen Elizabeth to the time of George IV.

I felt some difficulty from the fact that the Lady Chapel appears to have been treated exactly on the same footing, and to have been as exclusively as the building called the Fitzalan Chapel in the possession of the plaintiff and his predecessors in title, at least from the time of the Reformation. It is, as far as my knowledge of such matters extends, more difficult to suppose

(1) Speech at the Bristol election in 1780; 3 Burke's Works, 423, 424.

that the Lady Chapel was not originally open to the use of the whole parish, than under the circumstances of this particular case it is as to the rest of the building in dispute. But the alleged trespass here committed was not on any part of the Lady Chapel, and, except indirectly, no question arises as to the Lady Chapel itself regarded as a separate building. Further, the evidence as to user is wholly indistinguishable as to its effect, and includes the Lady Chapel as well as the rest of the building. And, further, I observe that, in the award of 1511, it seems to be assumed that the college is to repair the Lady Chapel as well as the rest of the disputed building; which is some, indeed is strong evidence to shew that at that time the college had the exclusive use of the Lady Chapel, and that the parishioners of Arundel had then no rights therein. I come to the conclusion, therefore, that, in this case, any facts proved as to the Lady Chapel, are by no means inconsistent with the claim of the plaintiff.

It is said, however, as I understand the defendant's argument, that, in an ecclesiastical building one and entire, as this is, it is almost impossible to suppose that there would not be one and the same organization throughout it, one and the same set of rights exercised over all its parts. The nave at Carlisle, the south transept at Chester, the Lady Chapel at Ely, the crypt (I believe) at Canterbury (but on this I speak without certain knowledge), the transepts at Merton College, Oxford, are instances in which parts of a physically united building, are used by different bodies with different rights. It may be that at Wymondham, at Dunster, and in several other places to which I have been referred in the very able paper of Mr. Freeman, a state of things more or less analogous to the state of things at Arundel is to be found. I do not, however, go into, for, I do not know the circumstances of, any one of these cases. Probably they differ in each case, and give rise in each case to different considerations. Probably a man better informed than myself in these matters could largely multiply the examples. In each case it is a question of evidence; and in this case it appears to me that the evidence shews that the vicar and parishioners of Arundel never had any rights in what they now claim as their chancel.

That an aisle or a chancel under the same roof with and open to the rest of a church *may* be shewn by evidence to be the property of a private person, is too clear for argument. Such cases exist in considerable numbers in all parts of England. Few of us but are aware of instances which establish this fact. That there is no legal principle to prevent it, is determined by the cases of *Churton* v. *Frewen* (1) and *Chapman* v. *Jones.* (2) The judgment of V.-C. Kindersley in the one case, and the argument of Dr. Stephens in the other, are indexes to the display of various learning upon the subject in which any one who thinks fit may indulge. I think it enough to say that the cases I have cited establish the proposition for which I have cited them; and, although it is true that the chancels or chapels which were the subjects of decision in those cases were not direct continuations of the nave, it is obvious that except as matter of evidence this can make no difference in the principle. It may be more unusual, and therefore more difficult to establish in fact that a chapel or chancel in the position of this building was not the parochial chancel of a church, and was a private chapel. But, once establish the proposition that a chapel or a chancel may be private property, and the question whether this or that building is private property in fact becomes a question of proof. I am of opinion that the proof of this building being always private property is as strong as the nature of the case allows.

I do not refer to text-books or to cases for the proposition that, with evidence of the fact of possession such as exists here, a legal origin for such possession, if a legal origin is possible, is to be presumed. If an authority is needed, *Jenkins* v. *Harvey* (3), which was twice tried, is sufficient to refer to. I content myself with saying that, if the evidence of exclusive user in this case is insufficient to establish the right of property in the plaintiff, the defendant must get a declaration that it is so from the Court of Appeal.

It is argued, indeed, that, if a place is once a parochial chancel, it always remains so; that there can be no prescription against the public; and that the evidence of 350 years is to go for nothing. In the sense in which and for the purpose for which this proposition was pressed upon me, I doubt its truth. I apprehend that, even if this building could be shewn clearly to have been the parochial chancel in the 14th and 15th centuries, every presumption possible in point of law ought to be made in favour of a possession so exclusive, so old, and so unbroken as the possession in the present case. But I need not stay to discuss this question. Here, the presumption fails. I am myself convinced and I think all the evidence shews that this building never was the parochial chancel, and that the possession of the 17th, 18th, and 19th centuries was but the continuation of the possession of the 14th and 15th. In truth there is nothing on the other side but the architectural evidence of a great and learned artist. There is no reason why I should hesitate to say that, if an opinion were proof of fact, there is no opinion in England to which I should listen with more respect and deference than the opinion of Mr. Butterfield. But I must determine this case to the best of my ability by proof of facts; and all the facts are, not merely according to technical rules of law but according to sense, against his opinion. Externally, and as an affair of building, any one who looks at Arundel church would, simply from what meets his eye, come to the same conclusion as Mr. Butterfield. It does not need his great authority to say that the general look of the building is in favour of the defendant. In truth his evidence was, as might be expected, a highly intelligent exposition of the architectural reasons for arriving, from the view of the building, at the conclusion at which, from the view only, every one would arrive. His evidence as to the facts of the building is unquestionable, but not really very important; when we follow him into the regions of opinion, the documents and the user of centuries appear to me to part company with him. Upon the first and most important question, therefore,—the property in the disputed building,—I am of opinion that the plaintiff has made out his case, and is entitled to my judgment.

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(1) Law Rep. 2 Eq. 634.

(2) Law Rep. 4 Ex. 273.

(3) 1 C. M. & R. 877; 2 C. M. & R. 383.

The second question, i.e. whether the nave of the church is entitled to light and air through the arch which leads into the eastward chapel, need not detain us long. It occupies, no doubt, a large space in the pleadings, but to the defendant at least it is manifestly unimportant. If the vicar and parishioners of Arundel have no rights eastwards of the transepts, whether they have a physical division between their church and the Duke of Norfolk's chapel cannot much signify. I must, however, decide this question, as it is raised; and I must decide it for the plaintiff.

The defendant justifies the trespass he has committed, by pleading that the plaintiff had by building a wall obstructed the light and air to which he on the part of his parish had a right, and that therefore he broke the wall down. But, in the first place, the very foundation of such a defence is wanting here. Assuming for his purpose, that light and air did come from the Duke of Norfolk's chapel to Arundel church, there is no evidence whatever that any sensible or serious diminution of either has been occasioned by the building of the wall which has been knocked down by the defendant. But, further, from 1811, or at latest from 1816, the parish had filled up the arch with boards on the western side of the iron lattice-work, which effectually shut out all light and air from the church, except what might come from a door at the bottom of the arch, which was proved before me to have been occasionally opened in hot weather. An attempt was made to shew that there had been an opening in the boards higher up in the arch; but the attempt failed, and there was no proof of this. In 1872 the church was restored, under a faculty, by Sir Gilbert Scott. He placed an altar and reredos right across the space where this door had been, and therefore, if the old state of things had remained, no light and scarcely any air could have come through this archway. I do not mean to decide whether this was or was not evidence of abandonment by the defendant of the rights which he now claims. But it is at any rate the strongest possible evidence that the rights were worthless, and that, if they have been interfered with in fact, it has not been to any extent which would give a legal ground of action.

It further appears to me that the 3rd and 4th sections of the Prescription Act, 2 & 3 Wm. 4, c. 71, are fatal to the maintenance of the action on this latter ground. The wall was erected by the plaintiff in September, 1873; the trespass committed by the defendant was in July, 1877. It appears from the correspondence, that, from the beginning, the Duke made the claim which he now makes; that he declined negotiation, and stood upon his rights; and that, if the vicar intended resistance, he at any rate did nothing whatever on which the Duke could bring an action for nearly four years after the wall was built. If ever, therefore, there was a right, which I gravely doubt, it has never been interfered with so as to give ground to an action, and, if it has been, the interference has been acquiesced in so as to destroy the right of action, if ever it existed. Indeed, I cannot but regret that the correspondence began with an assertion by the vicar of right to this building, which, whether so intended or not, could be met only by a counter-assertion of right on the part of the Duke. It was unwise, because it was unnecessary, to throw down the gage of battle; but, having thrown it down, it was matter of course that it should be taken up. If a man is told that he and his ancestors for centuries have been holding property which belongs to another, he must, unless he is prepared at once to yield to the claim, decline all discussion which proceeds on such a basis. With the evidence now before me, I cannot wonder that the Duke of Norfolk did decline all such discussion. Possibly, I do not know, but at least possibly, if he had been approached in a different spirit, the result to the vicar and the parish might have been very different. Possibly, even now, as this contest has been conducted, though with no concession on either side, yet with courtesy on both,—possibly some solution might be arrived at which, while preserving for the Duke of Norfolk all the rights in this building which he would care to preserve, might obtain for the parish all such use of it as would be of any benefit to them. I have no right, indeed, to mediate between the parties; but I have not, I think, gone beyond the duty of my office in suggesting that arrangement is possible, and, if possible, that it is on every account desirable.

Now, however, the parties are before me standing on their legal rights; and in this state of things, and for the reasons which I have set forth, I give judgment for the plaintiff for 40s. damages, and costs; and I award an injunction, as prayed for in the statement of claim. It follows that I give judgment against the defendant on his statement of defence and counter-claim, and upon the injunction he prays for therein.

Judgment accordingly.

Solicitors for plaintiff: *Few & Co.*

Solicitors for defendant: *Brooks, Jenkins, & Co.*

1879
May 3.

SCARAMANGA *v.* STAMP AND ANOTHER.

Shipping—Deviation—Charterparty.

A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master in consideration of 1000*l.* agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost.

In answer to questions put to them by the learned judge, the jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to save the lives of those on board her; but that it was reasonably necessary to do so in order to save her and her cargo:—

Held, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover against the owners the value of the cargo.

Affd on appl 5 CPD 295. CA

ACTION on a charterparty, by the freighters of cargo against the owners of the vessel for the loss of the cargo under the circumstances set out in the judgment.

The cause was tried before Lindley, J., at the last Easter Sittings, and was argued upon motion for judgment in the same sitting by

Butt, Q.C., J. C. Mathew, and *Lodge,* for the plaintiff, and by *Cohen, Q.C., Herschell, Q.C.,* and *F. O. Crump,* for the defendants. The authorities cited are all commented upon in the judgment.

Cur. adv. vult.

LINDLEY, J., delivered judgment, as follows:—

This was an action brought on a charterparty, by the freighters of a cargo of wheat against the owners of the steam-ship *Olympias*, for the loss of the cargo. By the terms of the charterparty the *Olympias* was to proceed with the wheat on board from Cronstadt to the Mediterranean. The excepted perils were the usual perils of the sea. The *Olympias* left Cronstadt on the 21st of November, 1877; she passed the Skager Rak on the 28th; on the 30th, whilst in her proper course, she sighted and went to the assistance of another ship in distress, called the *Arion*; and on the same day the master of the *Olympias* entered into an agreement to tow the *Arion* to the Texel for a sum of 1000*l.* In pursuance of this agreement, the *Olympias* took the *Arion* in tow, and proceeded with her towards the Dutch coast. On the night of the 2nd of December, 1877, the *Olympias* got ashore near the Terschelling Light, and she and her cargo were ultimately lost; and it is for this loss of cargo that the plaintiffs sue the defendants.

Inasmuch as the loss was caused proximately by perils of the sea, and by the terms of the charterparty the defendants are exempted from liability for loss occasioned by such perils, it was incumbent on the plaintiffs to prove the existence of circumstances which deprive the defendants of the benefit of this exemption. The plaintiffs accordingly relied on two grounds as sufficient for this purpose.

First, they contended that the loss of the ship and cargo was really attributable to the negligence of the master of the *Olympias.* If this proposition had been established, the plaintiffs would have been entitled to succeed; for, it is settled that, as between a freighter of cargo and the owner of the ship, the latter is liable for losses really attributable to the negligence of the master, although immediately caused by perils of the sea: *Grill* v. *General Iron Screw Collier Co.* (1), and *The Chasca.* (2) The jury, however, have decided this point in favour of the defendants; and, for the present at all events, the verdict must be treated as conclusive.

Secondly, the plaintiffs contended that the *Olympias* deviated from her course, and that, as the loss occurred after such deviation, the plaintiffs were entitled to recover, whether there was negligence on the part of the master or not, and whether the deviation was or was not the cause of the loss of the cargo.

The fact of deviation was hardly open to serious controversy, in the face of the evidence adduced at the trial, and especially of the captain's agreement of the 30th of November, and his own letter of the 4th of December, 1877, in which he said, in effect, that he should not have been where he was had it not been for the agreement. It is true that there was great conflict of testimony as to the proper course of the *Olympias* from the Hohlmen Light, on the

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(1) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.
(2) Law Rep. 4 Ad. & E. 446.

Danish coast, to the English Channel,—one set of witnesses saying that she ought not to have gone near the Texel, but should have made for Orfordness Light; and the other set saying that she should have sighted the Texel Light, and then made for the channel between the Hinder and Galloper Light-ships. But, notwithstanding this difference of opinion, none of the defendants' witnesses went the length of saying that there was no deviation on the part of the *Olympias;* and it appeared to me that there was so little real controversy on this point that I did not think it necessary to frame a distinct question as to the fact of deviation, to be answered by the jury.

The fact of deviation therefore being established, it follows that the plaintiffs are entitled to succeed, unless the deviation took place under such circumstances as rendered it justifiable: see *Davis* v. *Garrett* (1), which shews that the plaintiffs need not prove that the deviation caused the loss.

The defendants, however, contended that the *Olympias* was justified in deviating, inasmuch as she deviated solely in order to assist a ship in distress, and what she did was reasonable to save life. That the *Arion* was in distress, and in fact in imminent danger, was hardly, if at all, disputed: but, in answer to questions put to the jury, they found,—first, that it was not reasonably necessary to take the *Arion* to the Texel, in order to save the lives of those on board her; but,—secondly, that it was reasonably necessary so to do in order to save her and her cargo. Upon these findings the plaintiffs claim to be entitled to the judgment of the Court; and I am of opinion that they are so entitled.

On grounds of humanity, it may be taken as established that a master of a ship is at liberty to deviate from his course in order to save, and so far as may be necessary to save, persons found by him, when prosecuting his voyage, to be in danger of their lives. There is no temptation to abuse this liberty; for, salvage is not payable for the mere preservation of life; and owners of ships, owners of cargo, and insurers may well be treated as impliedly assenting to a departure for such a purpose from the contract not to deviate, which although not expressed is always implied in contracts of affreightment and insurance. The reasons for holding the master justified in deviating to save life are overwhelming. To deny him this liberty would be to shock the moral sense of every right-minded person, and to ignore the clear moral duty of assisting fellow creatures in distress.

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(1) 6 Bing. 716.

But, the jury having negatived the necessity for deviating in order to save life, the defendants are driven to contend that the deviation of the *Olympias* was justifiable inasmuch as it was necessary to save the *Arion* and her cargo. No authority was cited, nor indeed is any to be found, in support of this contention; but general principles of expediency were appealed to, and I therefore will shortly state why in my opinion the liberty to deviate ought not to be extended to cases such as I am now considering.

The reasons in favour of an extension of the liberty are as follows:—1. It is for the benefit not only of uninsured owners of ships and cargoes in peril, but also of insurers of such ships and cargoes that they shall be saved, and that no obstacle shall be thrown by judicial decision in the way of those who are ready and willing to save ships and cargoes in distress. 2. The interest of owners of ships and cargoes and their insurers is in fact the interest of the public, and therefore it is for the interest of maritime commerce in general, and of the public in general, that the masters of ships should be at liberty to succour other ships in distress, without fear of loss of freight or liability for loss of cargo or loss of claims on insurers. Up to a certain point, the principles here suggested may be conceded. Indeed, they are recognized by the laws of all civilized countries. The whole law of salvage is based upon them; for, salvage is awarded to those who, being under no obligation to exert themselves to save ships and cargoes in peril, do so exert themselves successfully. The question I have to decide is, whether by the law of this country the owner of a ship deviating to save property is exonerated from the ordinary consequences of deviation.

In order to answer this question, it will be convenient to consider the interests of the various parties immediately affected by such a deviation. 1. As regards the mariners,—their right to salvage is a sufficient inducement to them to succour ships in distress. 2. The owner of the succouring ship shares the salvage, and the salvage is always proportionate to the risk run; and one

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of the risks run by the owner of the succouring ship is, possible loss of freight, loss of benefit of insurance, and possible liability for loss of cargo. His remuneration, therefore, in the shape of salvage (if any is earned) indemnifies him against all risks incurred by him by the deviation of his ship. 3. The owner of cargo, if the cargo be lost after a deviation, has his remedy against the ship-owner. The owner of cargo has, therefore, really no interest in the question under discussion, unless the ship-owner be insolvent, which is too rare an event to influence a general rule, and which when it occurs may be exceptionally dealt with. 4. Unless under very special circumstances, the owner of cargo on board the saving ship does not share salvage; and it would be most unjust to hold that the risk to his cargo might be increased by salvage services, when he obtains no benefit whatever from the salvage awarded for them. 5. The same observation applies to the underwriters of the saving ship and her cargo. Their risk is increased by the supposed deviation, but they do not share the salvage awarded for it. 6. The interests of the owners of the saved ship and cargo, and of the respective underwriters thereof, are protected by the inducement afforded by salvage to those who hazard their lives and ships to save ships and cargoes in peril of destruction.

The above considerations shew that the owner of the deviating ship is only exposed to risk without remuneration when no salvage is earned: but, to protect him in such a case at the expense of owners of cargo and underwriters, i.e. by increasing their risks without even the hope of remuneration, would be in the highest degree unjust to them. Moreover, it would be most dangerous to hold that masters of ships may for reward or the hope of reward deviate with impunity in order to save property. Such a doctrine would open wide the door for the entrance of fraud; and would tempt masters to enter into secret agreements for their own benefit, and to conceal them if all went well, and, if not, then to set up as an excuse for their conduct a deviation to save the property of others.

The reasons against an extension of the doctrine of permitted deviation to save property appear to me far to outweigh the reasons in its favour. To permit deviation to save life is an anomaly, justified by reasons which have no application whatever to deviation to save property: and on principle, therefore, I decline to extend the doctrine as desired by the defendants. I do this the more readily as the propriety of so extending it has been considered before now, and been uniformly negatived by those who have had to consider it. I have, in order to decide this case, availed myself of every assistance within my reach. Every text-writer I have consulted,—including Arnould, Phillips, Kent, and Parsons,—is in favour of the conclusion at which I have arrived; and the reasoning of Mr. Justice Washington, in *Bond* v. *The Brig Cora* (1), in support of the same view, appears to me unanswerable. Still, as this is the first case in this country in which the point I have to decide has arisen and required a distinct decision, I have thought it desirable to give the reasons for my opinion at greater length than I should otherwise have done.

I was informed at the trial that this was in substance an action by underwriters against underwriters, and that the particular underwriters who bring this action are acting contrary to the views and wishes of other persons in the same interest as themselves. Be it so: it is nevertheless plain that all I have to deal with are the rights of the plaintiffs as owners of cargo against the defendants as owners of the ship *Olympias.* Those rights depend on the charterparty; for, the bills of lading do not vary from it, and are to the same effect. I have nothing to do with any policies, and know nothing of their language. By the charterparty, the defendants became liable to the plaintiffs for the loss of their cargo, unless such loss was within one of the excepted perils. The excepted perils, although covering perils of the sea, did not cover such perils, if subsequent to an unauthorized deviation: *Davis* v. *Garrett.* (2) The deviation in this case was in my opinion unauthorized; and I therefore give judgment for the plaintiffs for such a sum as may be found to be due by a referee, it having been arranged that the actual figures shall be referred to a gentleman to be agreed upon. The costs of the action must be borne by the defendants.

Judgment accordingly.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*

Solicitors for defendants: *Crump & Son.*

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(1) 2 Wash. C. C. 80.

(2) 6 Bing. 716.

1879
May 16.

TOZER, Appellant; LAKE, Respondent.

Bastardy—Application for Summons by a Married Woman—35 & 36 Vict. c. 65, ss. 3, 4.

A bastardy order under 35 & 36 Vict. c. 65 cannot be made where the mother has married since the birth of the child, and is at the time of the application living with her husband, although she took out a summons against the putative father before her marriage, and was prevented from serving it by his default.

Case stated by justices for Devon under 20 & 21 Vict. c. 43.

At a petty sessions holden at Crockennwell, in the county of Devon, on the 7th of April, 1879, an information or complaint was preferred by Charlotte Lake (formerly Charlotte Undery), the respondent, against Henry Tozer, the appellant, under s. 3 of the Bastardy Laws Amendment Act (35 & 36 Vict. c. 65), charging that she had been delivered of a bastard child of which he was the father; and he was adjudged to be the putative father, and ordered to pay to the respondent 1*s.* 9*d.* per week until the child should attain the age of thirteen years, or should die, with costs.

Upon the hearing, it was proved that, on the 7th of June, 1876, the respondent was a single woman, and was then delivered of a male bastard child,—That within twelve months of the birth of such child, to wit, on the 6th of July, 1876, the respondent, being then a single woman, and known by the name of Charlotte Undery, made application, under s. 3 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), to a justice for a summons to be served on the appellant as the putative father of the child, and that such summons was duly issued, but not served, by reason of the appellant having absconded and his residence not being known,—That, in October, 1877, the appellant went to the respondent's father and arranged to pay to the respondent the sum of 1*s.* 9*d.* per week towards the maintenance of the child, and did pay and continued to pay 1*s.* 9*d.* per week to the respondent until the 17th of September, 1878,—That, on the 17th of September, 1878, the respondent was married to William Lake,—That, on the 11th of March, 1879, the same justice, upon the application of the respondent, issued a second summons under and by virtue of the application made to him by the respondent on the 6th of July, 1876, to the appellant to appear before the justices on the 7th of April, 1879,—And that, on the last-mentioned day, he appeared in accordance with the summons, which was duly served on him on the 25th of March, 1879.

The respondent stated that the appellant was the father of her said child; and her evidence was corroborated in some material particulars by other evidence, to the satisfaction of the justices.

On behalf of the appellant, it was contended that the respondent's marriage ousted the jurisdiction of the magistrates, and precluded them from making any order.

On behalf of the respondent it was contended that, as the respondent had when she was a single woman duly made her application within the prescribed time, and that as the first summons issued on that application had proved abortive owing to the absconding of the appellant, the respondent was entitled at any time to have another summons issued under and by virtue of the said application, and that at law any second or other summons issued by the same justice would be merely a continuation of the original proceeding, and that such second summons having been issued by the same justice under and by virtue of the application made by her to him when a single woman, she was entitled to an order against the appellant.

The justices considered that, the respondent having made her application within the prescribed time and when she was a single woman, and that, as the first summons had proved abortive by reason of the appellant having absconded, the issue of the second summons was strictly regular, and but a continuation of the proceedings previously instituted by her, and that the fact that she had married between the date of her first making the application and the hearing of the information did not oust their jurisdiction or prevent them from making an order; and they adjudged the appellant to be the putative father, and made the order above mentioned.

The question for the opinion of the Court was whether the justices were legally justified in making the order.

Croome, for the appellant. The justices had no jurisdiction to

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make the order; the 35 & 36 Vict. c. 65, s. 3, providing that the applicant must be a single woman at the time of the complaint. (1) The Queen's Bench Division so decided in *Stacey* v. *Lintell.* (2)

Tyser, for the respondent. The woman was single when the original summons was applied for. The Act nowhere provides that the woman must be single when the order is made.

DENMAN, J. *Stacey* v. *Lintell* (2) is a distinct authority to shew that s. 3 of 35 & 36 Vict. c. 65 does not apply where the application for the summons is made by a married woman. The justices here thought they were warranted in making the order, because the woman when single had made an application for a summons which by reason of the appellant having absconded could not be served. It is not stated that the justices were acting upon that summons; but it appears beyond all doubt that the order was made upon a summons which issued after the respondent had become a married woman; for, it is stated that she was married on the 17th of September, 1878, and that, on the 11th of March, 1879, a second summons was issued, which was the summons under which the order now appealed against was made. The order clearly ought not to have been made.

LINDLEY, J. I am of the same opinion. There never was an order upon a summons issued by this woman when she was single. The magistrates seem to have thought that they might treat the second as a continuation of the first abortive summons. That clearly cannot be.

Order quashed.

Solicitors for appellant: *E. W. & R. C. Mote, for Carter & Son, Torquay.*

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(1) By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3: "Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act, may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance," make application for a summons to be served upon the putative father, &c.

(2) 4 Q. B. D. 291.

PARRY *v.* SMITH.

1879
May 31.

Negligence—Article of Dangerous Nature—Contractor—Misfeasance.

The defendant, a gas-fitter, was employed by the plaintiff's master to repair a gas-meter upon his premises, and for the purpose of doing so took away the meter and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone in the ordinary performance of his duty with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him.

The jury found that the work had been negligently done, and that the injury to the plaintiff proceeded entirely from such negligence:—

Held, that the defendant was liable.

This was an action brought by the plaintiff to recover damages for an injury sustained by him in consequence of the alleged negligence of the defendant in doing work of a dangerous character upon premises on which the plaintiff was employed as a servant. The case was tried before Lopes, J., at the London Sittings in 1878, and was argued upon further consideration in Hilary Sittings, 1879, by *Finlay* and *Gore*, for the plaintiff, and by *Waddy, Q.C.*, *Oppenheim*, and *Bradford*, for the defendant. The facts and the arguments of counsel are very fully set out in the judgment.

The following authorities were cited:—

For the plaintiff,—*Farrant* v. *Barnes* (1); *Corby* v. *Hill* (2); *Gladwell* v. *Steggall* (3); *Martin* v. *Great Indian Peninsular Ry. Co.* (4): *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (5); *George* v. *Skivington* (6); *Southcote* v. *Stanley* (7); *Rapson* v. *Cubitt.* (8)

For the defendant,—*Winterbottom* v. *Wright* (9); *Longmeid* v. *Holliday* (10); *Collis* v. *Selden* (11); *Blackmore* v. *Bristol and Exeter Ry. Co.* (12); *Robertson* v. *Fleming.* (13)

Cur. adv. vult.

(1) 11 C. B. (N.S.) 553; 31 L. J. (C.P.) 137. 8 Jur NS. 868

(2) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 218. 4 Jur NS. 572.

(3) 5 Bing. N. C. 733.

(4) Law Rep. 3 Ex. 9.

(5) 11 C. B. 655; 21 L. J. (C.P.) 34.

(6) Law Rep. 5 Ex. 1.

(7) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(8) 9 M. & W. 710.

(9) 10 M. & W. 109.

(10) 6 Ex. 761; 20 L. J. (Ex.) 430.

(11) Law Rep. 3 C. P. 495.

(12) 8 E. & B. 1035; 27 L. J. (Q.B.) 167. 4 Jur NS. 657.

(13) 4 Macq. 167.

May 31. LOPES, J. This action was brought by the plaintiff to recover damages in the following circumstances:—The plaintiff was in the employ of Messrs. Moses & Son, as one of their housekeepers. The defendant was a gas-fitter employed by Moses & Son to repair a gas-meter in a cellar belonging to Moses & Son on the premises where the plaintiff was employed. The defendant found it necessary to take away the meter to repair it, and replaced it by a temporary connection consisting of a flexible tube, one end of which was pushed into the inlet pipe and the other end into the pipe communicating with the house. The ends of both the pipes were bound round with rags and string and puttied up, and a drawer was put under the curve of the tube so as to support it and take the weight off the fastenings. After the temporary connection had been so placed by the defendant, and he had gone away, the plaintiff, whose duty it was to turn on and light the gas in the cellar, went there for the purpose with a light. Directly the plaintiff opened the cellar door an explosion took place, and he was knocked down and seriously injured.

There was a large body of evidence called on both sides; the plaintiff's evidence going to shew that the mode of connection was unsafe; the defendant's that it was safe. It was agreed that the damages, if the plaintiff recovered, should be 50*l.*

I left three questions to the jury,—first, was the defendant negligent in doing the work,—secondly, did the accident proceed entirely from the defendant's negligence,—and, thirdly, was the plaintiff also negligent, and was his negligence such that but for his negligence the accident would not have happened. I told the jury that, if they answered both the first questions affirmatively, they need not consider the third. The jury answered these questions in the affirmative, and found a verdict for the plaintiff for 50*l.*

Mr. Waddy at the end of the plaintiff's evidence had submitted that there was no case for the jury. I thought there was, and did not stop the case, but said I would reserve judgment and consider the points of law. I also consented to make any amendments which might be necessary to raise the real question between the parties.

Subsequently the points of law were argued before me. Mr.

Waddy contended, on the part of the defendant, that there was no cause of action, unless there was privity between the plaintiff and the defendant, or unless what was done by the defendant amounted to a public nuisance, or unless there had been on the part of the defendant fraud, misrepresentation, or concealment. It was contended by Mr. Finlay, on the part of the plaintiff, that the action would lie, because the defendant knew he was dealing with gas, a thing highly dangerous in itself unless great care and caution were used in its management; that the plaintiff's right of action was founded, not on contract, but on the duty which attaches to the use or dealing with a thing in its nature highly dangerous and likely to cause damage, unless managed with great care and caution.

I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract.

It is strange that there is no direct authority on the point. A large number of cases were cited, but none of them directly in point. The case of *Collis* v. *Selden* (1) was relied on by Mr. Waddy in argument. This was a demurrer to a declaration; and it was held that the declaration was bad, because it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action would lie. Willes, J., in his judgment, seems to have contemplated an action like the present; for, he says: "The declaration is not founded upon any duty of the occupier to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known, but is founded on alleged carelessness in doing an act, viz. hanging a chandelier. The chandelier is to be regarded as movable property; and the declaration should have shewn either that it was *a thing dangerous*

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(1) Law Rep. 3 C. P. 495.

in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house."

Rapson v. *Cubitt* (1) is in point. There, the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute part of the work. In the course of doing it, through B.'s negligence the gas exploded, and injured the plaintiff, who was the butler of the club. It was held that the defendant was not liable, on the ground that B. was not his servant, but an independent sub-contractor. It seems, however, to have been assumed that an action against B. would have been maintainable.

All the other cases cited are distinguishable from this case. They are not cases where the alleged cause of action is in respect of a breach of duty in using or dealing with a thing in its nature dangerous and likely to cause injury unless great care is used.

There must be judgment for the plaintiff for 50*l.* and costs.

Judgment accordingly.

Solicitor for plaintiff: *E. W. Parkes.*
Solicitors for defendant: *Wild, Brown, & Wild.*

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(1) 9 M. & W. 710.

HILL AND OTHERS *v.* WILSON AND OTHERS.

1879
March 29.

Shipping—Average Adjustment at a Port of Refuge—Pro Ratâ Freight.

The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the ship-owner and the owner of cargo, warrant an average adjustment at the intermediate port.

To entitle a ship-owner, in the absence of a special contract, to demand pro ratâ freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shewn that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port.

A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with pro ratâ freight from Riga to Copenhagen.

In an action for the price realized by the sale at Copenhagen:—

Held, that the ship-owners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor pro ratâ freight.

THE plaintiffs in this action are the indorsees of certain bills of lading of goods shipped in November, 1876, at Riga, on board the *Virago*, for carriage to and delivery at Hull. The defendants are the owners of that ship.

The *Virago* sailed from Riga with a general cargo, and was stranded and injured. Part of her cargo was saved; part was washed out and lost; and part was jettisoned, and in respect of this part a claim for general average arose. The ship was got off, and was towed into Copenhagen on the 9th of December, 1876. Her cargo was there discharged on the 3rd of January, 1877. She was repaired at a large expense between the 13th and 31st of January, and on the 7th of February was sent on to Hull, where she arrived on the 10th.

The plaintiffs' goods arrived at Copenhagen, but, being much damaged, were there sold; and it is admitted that they were properly sold. The present action is brought for the amount realized by the sale, after deducting such charges and general average expenses as the defendants would be entitled to deduct by English as distinguished from Danish law. As a matter of fact, the general average expenses had been ascertained at Copenhagen. The average had been thus adjusted according to Danish law; and the adjuster had charged the plaintiffs with pro ratâ freight from Riga to Copenhagen. The result was more favourable to the defendants than would have been the case if the adjustment had been made according to English law; and the defendants claimed to deduct from the proceeds of the sale of the goods a larger sum than the plaintiffs considered them to be entitled to. The defendants paid 1460*l.* 4*s.* 9*d.* into court; and it was admitted that that sum was sufficient if the defendants were correct in their contention. It was also agreed that, if they were in the wrong, the accounts should be referred to some third person for re-adjustment.

The *Virago's* cargo, when she left Riga, consisted of 1893 tons of goods: of these, 30 tons were jettisoned, and 1643 were sold at Copenhagen. There then remained 220 tons. Of these, part was forwarded by the *Mito* on the 13th of December, 1876, part by the *Otto* on the 31st of January, 1877, and part by the *Mito* on the 31st of January, 1877. The rest (amounting to 127 tons) came to Hull in the *Virago* herself. The *Mito* and the *Otto* both belonged to the defendants; and full freight (by which was understood the full original freight from Riga) was paid for that part of the cargo which came home in them. Full freight was also paid for so much of the 127 tons brought home in the *Virago* as did not belong to the defendants themselves. But about 50 out of these 127 tons consisted of lathwood which had been abandoned to the defendants as underwriters thereof; and in respect of these 50 tons no freight was payable.

The cause was tried before Lindley, J., at the Michaelmas Sittings, 1878, when a verdict was found for the plaintiffs, and was heard upon further consideration on the 19th of December, 1878, and the 29th of March, 1879.

J. C. Mathew (*Butt, Q.C.,* and *Watkin Williams, Q.C.,* with him), for the plaintiffs, contended that the adjustment should have been

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made at Hull, the ship's port of destination, and not at Copenhagen, the ship being a British ship, the bill of lading being an English bill of lading, and the goods being deliverable in England; and that the defendants had no right to deduct pro ratâ freight, which is only recoverable when provided for by the bill of lading. He referred to *Simonds* v. *White* (1); 2 Arnould on Insurance, 5th ed. 872; and Benecke on Indemnity, ed. 1824, p. 326.

Edwin Jones (*Webster, Q.C.*, with him), contended that the adjustment was properly made at Copenhagen, where there was practically an abandonment of the voyage, a complete change of the adventure, and where the sale of the bulk of the cargo took place with the assent of all parties interested; and that the shipowners were entitled to pro ratâ freight. He cited *Fletcher* v. *Alexander* (2); *Mavro* v. *Ocean Marine Insurance Co.* (3); 1 Parsons on Shipping, 465; 2 Parsons, 366; 2 Phillips on Insurance, 5th ed. § 1414.

Cur. adv. vult.

March 29. LINDLEY, J., after stating the facts at ante, p. 329, delivered judgment as follows:—

It thus appears that the ship with part of her original cargo on board arrived in Hull, the original port of discharge, and that the defendants received the original full bill of lading freight for such cargo, except for that part of it which belonged to themselves and paid no freight.

A long correspondence was put in evidence, and was referred to; and I have read the whole of it. That correspondence and the defendants' answers to the plaintiffs' interrogatories shew,—1. that the cargo forwarded from Copenhagen was forwarded by the instructions of the consignees or the underwriters,—2. that the whole of the undamaged cargo might have been brought on to Hull in the *Virago* herself after she had been repaired,—3. that the plaintiffs never assented to, but always protested against, an adjustment of the average at Copenhagen.

Under these circumstances, I am of opinion that it is incumbent upon the defendants to shew that the Danish adjustment is binding upon the plaintiffs; it is incumbent on the defendants to shew that the voyage was terminated at Copenhagen by the occurrence of circumstances which necessitated or justified such termination, and, as a consequence, necessitated or justified a general average adjustment at that port.

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(1) 2 B. & C. 805.

(2) Law Rep. 3 C. P. 375.

(3) Law Rep. 9 C. P. 595; Law Rep. 10 C. P. 414.

Very little information is to be obtained upon the question what circumstances terminate a voyage at an intermediate port, when the ship with part of her cargo on board arrives at her original port of discharge. The only cases reported in our own books on this point are *Fletcher* v. *Alexander* (1) and *Mavro* v. *Ocean Marine Insurance Co.* (2) In *Fletcher* v. *Alexander* (1) a ship laden with salt sailed from Liverpool for Calcutta. She got ashore, and returned to Liverpool. The whole cargo except 100 tons was lost or so damaged as to be worthless; and the 100 tons were not forwarded. The ship herself after being repaired went on to Calcutta, her original port of destination, but with an entirely new cargo, and in fact on a totally different voyage. It was decided, amongst other things, that, the voyage having been broken up at Liverpool, Calcutta was not the place for adjustment. The arrival of the ship at Calcutta, and the possibility of forwarding the undamaged salt to the same place, did not prevent the Court from holding the voyage to have been broken up at Liverpool, and from holding Liverpool to be the proper place for adjustment. In *Mavro* v. *Ocean Marine Insurance Co.* (2), a ship laden with wheat sailed from Varna for Marseilles. She became disabled, and put into Constantinople. Part of the cargo, which was damaged, was sold there: the rest was transhipped and sent on to Marseilles. The ship was repaired at Constantinople after a lapse of two months; but whether she ultimately proceeded to Marseilles does not appear. The above steps were taken by the direction of the consular court of Constantinople; and under its direction an adjustment of average was made there. This adjustment was made according to the law of France, which under any circumstances was the law applicable to the case. The Court held that the voyage had been properly broken up at Constantinople, and that the adjustment there was binding, although some cargo arrived at Marseilles and the ship was herself repaired and sent to sea. The real question in this case was the true construction of an English policy of insurance containing the words "general average as per foreign statement;" and the case does not throw much light on any other question.

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(1) Law Rep. 3 C. P. 375.

(2) Law Rep. 9 C. P. 595; Law Rep. 10 C. P. 414.

In this state of the authorities, it is necessary to consider the matter on principle. The duty of the ship-owner is, to complete the voyage if he can. If owing to perils of the seas he is compelled to put into an intermediate port for repair, his duty is, to re-fit, and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss sustained after she has been repaired and is sailing from the port of repair to her original port of destination; and a policy on her original cargo will still cover so much of such cargo as is being carried in her between the same ports. In a case of this description, the original voyage is not regarded as broken up into two, viz. first into one voyage from the port of sailing to the port of refuge, and secondly into another voyage from such port to the port of destination.

Again, if the ship-owner, being unable to repair his ship, tranships the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton* v. *Thornton* (1), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage: 1 Arnould on Insurance, 2nd ed. 491.

These considerations appear to me to shew that, in order to uphold the Danish adjustment in this case as against the plaintiffs who have never assented to it, the defendants must prove two things, viz. first, that the original voyage was in fact terminated at Copenhagen, and, secondly, that it was so terminated either by agreement or by necessity, i.e. the occurrence of circumstances beyond the control of the defendants, and such as rendered

(1) 9 Ad. & E. 314.

the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view.

As a mere question of fact, my opinion is that the voyage did terminate at Copenhagen. With respect to 90 tons of the original cargo, there was no termination whatever of the voyage at that port, but only a suspension of it whilst the ship was under repair. The plaintiffs' goods were no doubt sold at Copenhagen, and as to them the voyage obviously terminated there: but this of itself cannot make an average adjustment there binding on the plaintiffs, as will be seen at once by supposing all the rest of the cargo to have been brought home in the *Virago* after a short detention for repairs.

But, assuming the original voyage to have in fact terminated at Copenhagen, neither the necessity for its termination there nor its termination by any agreement binding on the plaintiffs is proved. The desirability of having the average adjusted at Copenhagen, in order to obtain an allowance of distance freight, and the desirability of bringing about a separation of ship and cargo in order to obtain an adjustment at Copenhagen, were clearly seen by Hansen, and were pointed out by him to the defendants; and the correspondence satisfies me that the adjustment at Copenhagen was not the consequence of an inevitable breaking up of the voyage there, but was the cause of the voyage being broken up there, so far as it can be said to have been broken up with respect to the ship and the undamaged goods.

The letters which shew this to have been the case are as follows:—6th of December, 1876, 19th of December, 1876, 12th of January, 1877, 13th of January, 1877, 15th of January, 1877, 16th of January, 1877, 21st of January, 1877, 22nd of January, 1877, and 26th of January, 1877.

In coming to this conclusion, I do not accuse the defendants of bad faith. Their letter of the 13th of January, 1877, and a letter from Mr. Bott to them of the 4th of July, 1877, shew that the defendants were under the impression that the proper place for adjusting the average was where the damaged goods were sold, or that the defendants as ship-owners had some option in the matter. This was in my opinion an erroneous view; and, for the reasons already stated, I decide that the plaintiffs are not bound by the Copenhagen adjustment.

The defendants, however, contend that, irrespective of this adjustment, they are entitled to charge the plaintiffs pro ratâ freight on their goods which were carried from Riga to Copenhagen and there sold. This contention can only be supported by establishing some contract, express or implied, binding the plaintiffs to pay pro ratâ freight. Express contract there is none; and the only grounds relied upon for implying a contract are that the plaintiffs' goods were sold at Copenhagen with their consent given expressly or impliedly to Hansen, who acted for the best for all parties. But, assuming this to be so, the goods were in fact sold because they were so damaged as not to be worth forwarding; and a sale under such circumstances, whether approved by the plaintiffs beforehand or ratified afterwards by claiming the proceeds of sale, is not enough by English law to render distance freight payable: see *Hopper* v. *Burness* (1), and the cases there cited. To have that effect, the circumstances must be such as to give the cargo owner an option of having his goods sent on to their destination, or of accepting them at the intermediate port. If, having that option, he accepts the goods at the intermediate port, he is bound to pay pro ratâ freight: see M'Lachlan on Shipping, 2nd ed. p. 446. But here the plaintiffs had no such option: there was nothing equivalent to a voluntary acceptance by them of the goods at Copenhagen.

Upon both points, therefore, my judgment is for the plaintiffs, with costs,—the amount to be referred to an English average adjuster.

Judgment accordingly.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Lowless & Co.*

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(1) 1 C. P. D. 137.

1879
May 16.

In re BRIDLE.

Will, Construction of — Specific Legacy of outstanding Mortgage— Ademption.

Testator bequeathed to his niece L. B. "the mortgage of 200*l.* which he had secured to him on a mortgage of premises (describing them) belonging to W. H." After the making of the will and before the testator's death, the mortgage debt due to him from W. H. had been paid off:—

Held, that the specific bequest to L. B. was adeemed, and that the fact of the testator having placed the 200*l.* to a separate account at his banker's, and put the pass-book in which that sum was credited to him in her hands made no difference.

Appeal from the County Court of Dorsetshire holden at Weymouth.

1. This was a petition presented by Louisa Bridle, asking for payment out of court to her of a sum of 200*l.*, after deducting the costs of the petition, or for such other order as might be just.

2. John Bridle, late of Melcombe Regis, in the county of Dorset, died on the 28th of January, 1877. By his last will and testament, bearing date the 21st of December, 1872, he bequeathed unto the petitioner Louisa Bridle, all his, the testator's, household goods and effects of every description which might be in and about his, the testator's, dwelling-house at the time of his decease; and also the mortgage of 200*l.* which he had secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to William Hardy: And, after making certain specific devises and also certain pecuniary and other bequests, the testator bequeathed certain messuages and premises in the said will described, together also with all the rest, residue, and remainder of his real and personal estate not thereinbefore disposed of, unto T. Abbott, S. Gale, and T. B. Nicholas, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively, Upon trust to sell the same in manner therein mentioned, and to stand possessed of the moneys arising from such sale or sales, calling in, and conversion into money, together with the moneys that the said testator might be possessed of at the time of his decease not thereinbefore disposed of, upon trust, after payment thereout of all his just debts, funeral, and testamentary

expenses, and the legacies thereinbefore contained, to divide the same equally between and amongst his, the testator's sister, Elizabeth Samways, widow of James Samways, and also amongst each and every the child or children of the said James and Elizabeth Samways, and to share and share alike as tenants in common; and, should either of them die before the testator, then the share of the one so dying should be divided equally amongst the survivors. And the said testator also declared that the legacies or shares of such of them as should be married women should be independent of their present or any future husband: and he appointed the said T. Abbott, S. Gale, and T. B. Nicholas, executors of his said will.

3. The said Abbott, Gale, and Nicholas, on or about the 16th of February, 1877, duly proved the will in the Blandford district-registry of the Probate Division of the High Court of Justice.

4. Abbott, Gale, and Nicholas, sold, collected, and converted into money, all such parts of the personal estate of the testator as did not consist of money, and divided the whole estate of John Bridle, deceased, in pursuance of the trusts of the will, with the exception of 200*l.* standing to the credit of John Bridle, deceased, on a deposit account at the branch bank at Weymouth of Messrs. Williams & Co. The petitioner caused application to be made to Abbott, Gale, and Nicholas, to transfer and pay over to her the said sum of 200*l.* so standing to the deposit account of John Bridle, deceased; but, owing to doubt as to the right of the petitioner Louisa Bridle to receive and give a discharge for the same, they have paid into the Post-Office Savings Bank at Weymouth the sum of 200*l.*, and the same is now standing therein in the name of the registrar of the county court to await an order of Court for the payment out or distribution of the said trust fund.

5. Louisa Bridle, on or about the 13th of December, 1878, filed a petition in the county court of Dorsetshire holden at Weymouth, for an order of the Court for her, Louisa Bridle, to be paid the said sum of 200*l.* so paid into the said Post-Office Savings Bank as aforesaid, she alleging that she was entitled to the same.

6. Louisa Bridle, the petitioner, supported her case by the affidavit of herself and also of Robert Oakley, bank-manager to

the said branch bank of Williams & Co., and which affidavits were duly filed in the court and were uncontradicted or cross-examined upon; the appellants giving no evidence of any kind or raising any objection to the facts as such, but only as to the inadmissibility in evidence of the facts contained in such affidavits, and allowed their case to depend upon the legal argument of the solicitor who appeared for them.

7. Louisa Bridle, in addition to the before-mentioned facts, proved that John Bridle at the time of making his will, viz. the 21st of December, 1872, had a mortgage of 200*l.* secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to one William Hardy. The mortgage was paid off, and the sum of 200*l.* was paid by the mortgagor to John Bridle on or about the 13th of October, 1873, being about nine months after his will was made.

8. John Bridle banked at the branch bank of Williams & Co., at Weymouth, and had a regular banking account with such branch bank, together with a pass-book: and Robert Oakley, whose affidavit had been filed was and had been for upwards of fourteen years the manager of such branch bank.

9. When the mortgage money of 200*l.* was on or about the 13th of October, 1873, paid to John Bridle, he took such sum to the said branch bank of Williams & Co. He did not pay it in to his general account, but had the same entered in his name to a separate account which he opened with the bank for that purpose; and he received a separate pass-book from the bank with the entry of that sum only, which book the testator handed into the custody of the petitioner; the testator stating when he did so that it was the money he had received from the mortgage of premises in King Street, Melcombe Regis, and that the petitioner was to keep the book, as he had willed the same to her, for her to receive the same after his death,—meaning the said sum of 200*l.*, stating it would shew that the money (meaning the 200*l.*) was for the petitioner, and would do away with the necessity of altering his will in consequence of the mortgage being paid off as aforesaid.

10. John Bridle allowed the 200*l.* to remain in the bank intact from the time he paid it in down to the time of his decease, and in no ways mixed it up with the other moneys, and only drew

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the interest from time to time; Louisa retaining possession of the pass-book John Bridle had received from the bank when he paid such money in as aforesaid.

11. The petition was served upon Abbott, Gale, and Nicholas, and upon the appellants Elizabeth Samways, M. A. Strickland, J. B. Brown, H. J. Samways, F. Vincent, and George Samways, and Lot Bridle Samways.

12. The appellants and Lot Bridle Samways are the persons who are entitled to the residuary estate of the testator.

13. The petition came on to be heard on the 22nd of February, 1879, and the hearing was adjourned to the 22nd of March, 1879, when the judge ordered that the costs of all parties should be taxed and paid out of the 200*l.*, and that the residue should be paid to the petitioner.

14. At the hearing of the petition the appellants objected that the evidence referred to in par. 9 of the case was inadmissible for the purpose of shewing what was the intention of the testator with reference to the 200*l.* The objection was overruled, and the evidence was admitted.

15. The appellants also contended that the gift of the mortgage of 200*l.* contained in the will was a specific gift, and had been adeemed by the payment off of the mortgage in the testator's life-time.

16. The petitioner contended that the evidence was admissible, and that no evidence of any kind had been given on the part of the appellants, and that the facts were not in dispute; that the gift was not specific, and that there had been no ademption; and that, in any event, as the mortgage-money of 200*l.* had been so set aside by John Bridle for the benefit of the petitioner, and had not been mixed up with his other moneys, the petitioner was entitled to the 200*l.*

The question for the opinion of the Court was, whether the petitioner was entitled to the 200*l.*, or whether the same formed part of the testator's residuary estate.

Bethell, for the appellant. This gift of 200*l.* is a specific gift, which has been adeemed, and the respondent is not entitled to a sum of 200*l.* to be paid out of the estate of the testator. The

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evidence set out in the case clearly was inadmissible, and, if admitted, really amounts to nothing: see the 5th proposition in Wigram on Wills, 4th ed. 65.

John Cutler, contrà. The cases of *Clark* v. *Browne* (1), *Lee* v. *Lee* (2), *Moore* v. *Moore* (3), and *Morgan* v. *Thomas* (4), establish that where a testator devises a specific debt due to him, if the debt is received by him during his life-time, there is an ademption; but that if, having received it, he sets it apart and does not treat it as part of his funds, there is no ademption. The principle is correctly stated by Stuart, V.C., in *Clark* v. *Browne* (5): "There is no doubt on the doctrine of ademption, that, if the legacy be a specific debt, and if, after making the will, the testator receives the amount so as to extinguish the debt, there is nothing upon which the words of the gift can operate." According to these authorities, there has been no ademption here. The strongest case against the petitioner is *Gardner* v. *Hatton* (6); but there was no evidence there of a setting aside of the subject-matter of the bequest, as there is here. The testator receives the 200*l.*, pays it in to his bankers, not to his general account, but to a separate account, and he hands over the pass-book, with that sum entered in it to his credit, to the legatee.

Bethell, in reply. This is a specific gift, not of a sum of 200*l.*, but of a mortgage debt of 200*l.* which had ceased to exist at the time of the testator's death; and there is no such evidence of a setting apart of the money as to take the case out of the ordinary rule.

DENMAN, J. The testator by his will bequeathed to the petitioner "the mortgage debt of 200*l.* which he had secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to William Hardy." It is impossible to read those words without seeing that the obvious intention of the testator was to give her the mortgage itself. Has there, then, been an ademption? That depends upon the rule stated by Lord

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(1) 2 Sm. & G. 524. 18 Jur 903.
(2) 27 L. J. (Ch.) 824.
(3) 29 Beav. 496.
(4) 6 Ch. D. 176.
(5) 2 Sm. & G. at p. 528. 18 Jur 904
(6) 6 Sim. 93.

Hardwicke, C., in *Humphreys* v. *Humphreys* (1), where he said that "the only rule to be adhered to was, to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." In all the cases relied on by Mr. Cutler, the language of the will was general, and no one of them conflicts with the rule there laid down, that, in the case of a specific bequest of a thing which has ceased to exist during the life-time of the testator, the legacy is adeemed.

LINDLEY, J. I am of the same opinion. The first question here is what was bequeathed to Louisa Bridle. It is a bequest of a mortgage,—a specific legacy. The only other question is, where is it? It is not to be found; and there is an end of it. In all the cases relied on by Mr. Cutler there was a bequest of something which at the death of the testator could be found. This doctrine is as old as the case of *Ashburner* v. *Macguire* (2), where Lord Thurlow, C., says: "As to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognised by Lord Talbot and Lord Hardwicke. It is that, where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed; but, if paid in without suit or demand, there is no intention to adeem: and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in *Attorney General* v. *Parkyn* (3), expressly exploded this distinction: so did Lord Macclesfield. I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinburne, § 20, p. 7. (4) But I doubt if the authors cited by him support him. Godolphin (5), referring to the same books, states the rule differently; and so have other writers. By the Civil Law it was competent for a man, after he had changed

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(1) 2 Cox, C. C. 184.

(2) 2 Bro. C. C. 108.

(3) Amb. 566.

(4) 6th ed. p. 548.

(5) Orphan's Leg. 4th ed. p. 434.

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the subject-matter of a specific legacy, to declare by his conduct that such a change was an ademption. The case put is of a gold chain which the testator, after having bequeathed it by his will, converts into a cup: the legacy is not adeemed, because the cup might be restored to its former shape. This has not been adopted by our law. There is no ground to say that, after a legacy is extinguished, a man by his conduct may revive it. It is contrary to common sense; as appears by the instance put. The gold chain may have been given as a legacy because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased." And see the judgment of Lord Thurlow in *Stanley* v. *Potter* (1), where it was held that a bequest of a debt is adeemed by the debt being paid to the testator in his life-time, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. For these reasons, I am of opinion that the petitioner is not entitled to the 200*l.*, and the judgment of the county court judge must be reversed, with costs.

Judgment reversed.

Solicitor for petitioner: *G. W. Barnard, for T. A. Harris, Weymouth.*

Solicitors for respondent: *Coombe & Wainwright, for R. N. Howard, Weymouth.*

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(1) 2 Cox, C. C. 180.

THE GUARDIANS OF THE POOR OF THE NOTTINGHAM UNION, APPELLANTS; TOMKINSON, RESPONDENT.

1879
June 25.

Evidence—Proceedings against Husband for maintenance of Child—Paternity of Child born in Wedlock—Evidence of Husband to prove Non-access—Evidence Further Amendment Act, 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3.

Proceedings by guardians of the poor before justices against a husband, to compel him to maintain a child which, although born of his wife in wedlock, he refuses to maintain on the ground that he is not its father, are not "proceedings instituted in consequence of adultery," within the meaning of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, so as to make his evidence admissible to prove non-access to his wife, and thereby bastardize the child.

CASE stated by justices under 20 & 21 Vict. c. 43.

The respondent appeared before the justices in petty sessions to answer a complaint made by the guardians of the Nottingham Union, the appellants, under 43 Eliz. c. 2, s. 6, and 31 & 32 Vict. c. 122, s. 36, and to shew cause why an order should not be made upon him to maintain his child Ernest, born of his wife Mary, and who was then chargeable to the appellants' union.

The respondent was married to his wife Mary on the 10th of March, 1863, and she had five children born after such marriage. The first four children, it was admitted, were their legitimate children, but the respondent denied that the fifth child Ernest, born on the 6th of October, 1873, was his lawful child. Up to October, 1872, the respondent and his wife had lived together, but at that time he ceased to live continually with her. She was then living at No. 1, Paradise Road, Lambeth, and the respondent was living at Conduit Street, Regent Street, at a distance of about four miles apart.

Evidence was given by Elizabeth Hankey that the respondent, in December, 1872, and January, 1873, had a key of No. 1, Paradise Road, where his wife was then living, and was seen on several occasions to open the door with such key and go into the house, on some occasions as late as one o'clock in the morning, and a particular occasion in December, 1872, was mentioned by Elizabeth Hankey, when she saw the respondent go into this house as late as one o'clock in the morning. The respondent was tenant of No. 1, Paradise Road, and maintained his wife and children there.

The respondent's wife was called on behalf of the appellants, and she proved that the child Ernest was her husband's lawful child; and that the respondent cohabited with her in November and December, 1872, and also in January, 1873. Evidence was also given by two other witnesses to corroborate her testimony.

Proof was given on the part of the respondent that in November, 1878, he had obtained a decree nisi for a dissolution of marriage with his wife, on the ground of her adultery with a man of the name of Martin, and the transcript of the shorthand writer's notes was given in evidence to shew that the decree nisi was based upon evidence which was tendered in the Divorce Court to prove that the adultery was committed on or about the 26th of December, 1872, but no evidence was given other than the production of the shorthand writer's notes to prove that fact, or to prove that she had at any time committed adultery.

The respondent was called, and swore that he had never had intercourse with his wife after the 20th of October, 1872, but he admitted that he slept in the same house as his wife (but not with her) at Whitsuntide, 1873, and that he was tenant of the house where his wife lived, at No. 1, Paradise Road, and paid the rent and supported her and the child in question and his other children there, until about the middle of November, 1873.

No other evidence was given to prove that the respondent did not have access to his wife at a time when the child may have been begotten, except the evidence of the respondent himself and his sister Mary Thorkell, who swore that after October, 1872, with the exception of going to Calais to take his child to school, the respondent never was out of their house at night later than eleven o'clock from October, 1872, to July, 1874.

It was contended on behalf of the appellants, that the child being born in wedlock must be taken to be the legitimate child of the respondent, that the decree nisi and the shorthand writer's notes of the proceedings of the Divorce Court were not evidence to prove the adultery of the wife in December, 1872 (although it was arranged that such notes should be admitted as evidence of adultery and separation of the respondent and his wife to save any order being sought by the guardians against the respondent for maintenance of his wife), and that even if the adultery at that date was proved, it did not follow that the child was not the lawful child of the respondent.

It was objected on behalf of the appellants that the respondent was not entitled to be examined on his own behalf, and that, if he was a competent witness, he was not entitled to prove that he had not had access to his wife, and thereby to prove that the child Ernest was not his lawful child.

The justices overruled these objections, and decided that although there was no evidence to prove that the respondent was not the father of the child, except the evidence aforesaid, they were entitled to take into consideration such evidence to prove that he was not the father of the child. They further decided that the evidence as given in the divorce suit proved that she had committed adultery in December, 1872, and that, even rejecting the respondent's evidence, there was evidence that they might take into consideration to prove that the child was not the respondent's child. They accordingly declined to make any order.

The question for the opinion of the Court was whether the justices were right in admitting the evidence objected to by the appellants, and whether there was evidence upon which the justices were entitled to find that the respondent was not the father of the child.

Wills, Q.C. (*Poland*, with him), for the appellants. First, it is well established law that the husband's evidence is not admissible to prove non-access to his wife, and so to bastardize his child. But a doubt has arisen on the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, which enacts that "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding." Two cases in the Chancery Division have raised the doubt. *In re Rideout's Trusts* (1), a petition by a widower for payment of certain moneys out of court, was opposed by one of the children of his marriage who was interested in the reversion. The evidence of the petitioner to bastardize his child seems to have been admitted by James, V.C. The Vice-Chancellor did not, however, act wholly upon it, but said, "I am afraid you must give me some other evidence." In *In re Yearwood's Trusts* (1); the evidence of a husband to prove the illegitimacy of children born of his wife in wedlock was admitted by Hall, V.C., on the authority of *In re Rideout's Trusts* (2), the Vice-Chancellor considering that James, V.C., treated such evidence as admissible, but not to be acted upon unless corroborated. The Court will not consider these cases as any positive authority in favour of the reception of the evidence.

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(1) Law Rep. 10 Eq. 41; 39 L. J. (Ch.) 192.

Reginald Brown, for the respondent. The question is whether there was any evidence on which the justices could find that the respondent was not the father of the child. Putting aside that given by the respondent, the evidence of non-access given by Mary Thorkell and the fact of the adultery at the period when the child must have been begotten were enough. The presumption of legitimacy is rebuttable, and was rebutted. Secondly. The evidence of the respondent was admissible. There are, no doubt, reasons of decency which may be urged against the admissibility of the husband's evidence of non-intercourse when he is cohabiting with his wife, but here they were not living together. 14 & 15 Vict. c. 99, enabled the parties to a suit to give evidence, and 16 & 17 Vict. c. 83, made husbands and wives of parties competent to do so, except in criminal proceedings or any proceeding "instituted in consequence of adultery." Then 32 & 33 Vict. c. 68, s. 3, removed the disability as to proceedings instituted in consequence of adultery. But, even without this Act, the evidence was admissible, for the wife was no party to the proceedings, which were between the poor law officials and her husband.

[*Wills, Q.C.*, admitted that the husband's evidence would have been admissible, except to bastardize his issue.]

In Taylor on Evidence, 7th ed. § 950, it seems to be suggested that the rule excluding the testimony of parents when the legitimacy of a child of their marriage is in question, to prove that they have or have not had connection, has been "indirectly superseded partly by s. 3 of the Act of 32 & 33 Vict. c. 68, and partly by two modern decisions," viz., *In re Rideout's Trusts* (2) and *In re Yearwood's Trusts.* (1)

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(1) 5 Ch. D. 545.

(2) Law Rep. 10 Eq. 41; 39 L. J. (Ch.) 192.

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These proceedings were "instituted in consequence of adultery," as, but for the adultery, the husband would not have refused to maintain the child. When the phrase was first used in 14 & 15 Vict. c. 99, s. 4, there was no Divorce Court, and therefore the exception of proceedings in consequence of adultery was not meant to apply to it, but rather to Chancery suits raising questions of legitimacy. And, therefore, the operation of 32 & 33 Vict. c. 68, s. 3, was probably not intended to be restricted to proceedings in the Divorce Court. If it had been, the legislature would surely have expressly said so.

There can be no doubt that James, V.C., in the case cited, admitted the evidence of the husband; whereas, if the contention for the appellants be right, the evidence was absolutely inadmissible. In *In re Yearwood's Trusts* (1) the whole question was before Hall, V.C., who expressly decided it in favour of the admissibility of the evidence.

A. Wills, Q.C., in reply, referred to *Goodright* d. *Stevens* v. *Moss.* (2)

GROVE, J. I think the case turns on the question really intended to be raised for our decision, viz., whether the evidence of the respondent was admissible or not. It has been contended that the question put to us is, whether on the whole evidence received by the magistrates there was sufficient to reasonably satisfy their minds of the fact of non-access, that is to say, non-intercourse between the husband and wife. But I do not think that was the question meant to be submitted to the Court, for it would have been one of fact merely. We ought to look at the whole case to ascertain the substantial point raised in it. Putting the husband's testimony aside there was strong evidence that he visited the wife's house on several occasions, entering it sometimes as late as one o'clock in the morning at a time when the child might have been begotten. To rebut that evidence testimony was given by his sister, who swore "that after October, 1872, with the exception of going to Calais to take his child to school, the respondent never was out of their house at night later than eleven o'clock from October, 1872, to July, 1874." It is singular that this woman with whom the respondent lodged should undertake to say that for a year and nine months he never was out of their house after eleven o'clock at night. How she could know this I fail to understand. Moreover, she does not say he never was absent from the house in the daytime. He might have spent all day with his wife and returned to his lodgings at eleven at night. So far there was no evidence to prove non-access. The only other evidence is the report of the proceedings in the Divorce Court, notes of which were put in to prove the adultery of the wife in December, 1872, about the time when the child was probably conceived. This evidence was objected to. It was contended that the shorthand writer's notes of the divorce proceedings were not evidence. But it was arranged that the shorthand notes, although not evidence, should be admitted without objection merely to prove the fact of the divorce for adultery, but not as evidence of the date of the adultery. I think those notes were certainly inadmissible to prove the adultery of the wife.

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(1) 5 Ch. D. 545; 39 L. J. (Ch.) 192.

(2) Cowp. 591.

The justices overruled these objections, and decided that, although there was no evidence to prove that the respondent was not the father of the child except the evidence aforesaid, they were entitled to take it into consideration to prove that he was not the father of the child.

Therefore the mere evidence on which they proceeded was the evidence of the husband, and the only other legal evidence was that of Mary Thorkell, the sister, which was worth nothing to prove non-access. So the real question in the case is, was the evidence of the husband admissible? It has been repeatedly decided, either positively, or negatively by such evidence never having been tendered, that, previously to the Evidence Acts rendering the evidence of husband and wife admissible in certain cases, their evidence was not admissible at common law, and Mr. Wills cited *Goodright* v. *Moss* (1) which shews that where the legitimacy of a child is the question in dispute, the testimony of the parents, that they have or have not had connection is inadmissible. A decision was scarcely needed to shew that such was the case at common law. But it is said that the evidence of the respondent was admissible by virtue of 32 & 33 Vict, c. 68, which enacts by sect. 3, that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceeding." The question is, was this proceeding before the magistrates "instituted in consequence of adultery?" I think the words of that section apply to the proceedings formerly instituted in the House of Lords, and subsequently in the Divorce Court, in consequence of adultery. Two cases have been cited in which James, V.C., is supposed to have decided that the husband's evidence was admissible notwithstanding the statute, and the report in the *Law Reports* gives some colour to the supposition. From that report it seems as if the Vice-Chancellor had received the evidence but had not been satisfied with it alone, although without expressing a positive opinion whether it was admissible or not, and had wished for corroborative evidence, which was obtained. But the report in the *Law Journal* gives a different colour to the case, and the marginal note expresses, at least, the opinion of the reporter that the learned judge really thought the evidence inadmissible, although he may not have expressly said so. We have arrived at the same conclusion. No doubt the Vice-Chancellor does not in terms say the case before him was not "a proceeding instituted in consequence of adultery," but the tendency of the case was in the opposite direction to that supposed by Hall, V.C.: *In re Yearwood's Trusts.* (1) My opinion is that the words "proceeding instituted in consequence of adultery" apply to proceedings which are really instituted to produce the result of divorce as a consequence of adultery—there may be possibly other proceedings to which the words apply—but that they do not apply to such proceedings as those in the present case, which are not instituted in consequence of adultery and to bastardize, but to legitimatize the child. I am of opinion that the judgment of James, V.C., is not a judgment opposed to our present decision. Even if it were so, it would not bind us, but, had it been an explicit and direct authority, we should of course hesitate before acting contrary to it. Although not absolutely a decision in terms, yet it seems to support our present judgment which is in favour of the appellant.

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(1) Cowp. 591.

LOPES, J. Two points are raised for our consideration. First, was the evidence of the husband admissible to prove non-access? Secondly, assuming that evidence to be inadmissible, was there other evidence in the case on which the magistrates were justified in acting. With respect to the first point. The law upon it before the Evidence Acts was beyond doubt, and is well stated in the headnote, which is quite borne out by the decision, in the case of *Rex* v. *The Inhabitants of Sourton* (1), that "neither husband nor wife can be examined for the purpose of proving non-access during marriage." The first Evidence Amendment Act is 14 & 15 Vict. c. 99, which by s. 2 entitled the plaintiff and defendant in actions at law to give evidence. But there was this exception contained in s. 4 that nothing in the Act contained should apply to any action or proceeding "instituted in consequence of adultery." It could not therefore be contended that the old law expressed in the case I have just cited was altered. Then came 16 & 17 Vict. c. 83, the effect of which was to do what the former Act was held not to have done, viz., to make husbands and wives of the parties to actions competent and compellable witnesses. But there, again, was the exception as to any proceeding "instituted in consequence of adultery:" s. 2. So, still, the law on this subject was unaltered. Then came the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), on which reliance is placed by the respondent. I understand the object of that Act was to make husband and wife in suits in the Divorce Court competent and compellable witnesses, and also to make the plaintiff and defendant competent and compellable witnesses in actions for breach of promise of marriage. Sect. 3 provides that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding;" and it is to be borne in mind that this Act repeals the exception in 14 & 15 Vict. c. 99 and 16 & 17 Vict. c. 83 as to proceedings instituted in consequence of adultery.

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(1) 5 Ch. D. 545.

The question is, whether the proceeding in the present case was "instituted in consequence of adultery?" The proceeding was this: an application was made to justices by the parish authorities to compel the husband to maintain a child born in lawful wedlock. I think that cannot be in any way said to be a proceeding instituted in consequence of adultery, and, but for the words of the

(1) 5 Ad. & E. 180.

1879

GUARDIANS OF NOTTINGHAM *v.* TOMKINSON.

Act, I should have thought it too clear for argument. It appears, however, that the present point has been raised in two cases in Chancery: *In re Rideout's Trusts* (1) and *In re Yearwood's Trusts.* (2) No doubt *Rideout's Case* (1) at first seems in point, but when more closely examined I think that, even from the report in the *Law Reports,* the decision cannot be deemed any authority for saying that the old law as to the inadmissibility of the evidence of the husband or wife to prove non-access is altered, and, indeed, James, V.C., used these words: "I do not like to say that the effect of statute is to supersede the old rule." I think the true view of that case is that the Vice-Chancellor was disinclined to decide the point, because he thought it unnecessary to do so, as other evidence was brought before him sufficient for him to act upon; and as to *In re Yearwood's Trusts* (2) the decision seems to entirely proceed on the presumed authority of *Rideout's Trusts.* (1) I do not think that either of those cases decide the point. If there had been any direct authority in Chancery I should have been very unwilling not to follow it, and should probably have done so, and have left the Court of Appeal to determine the question.

I think the husband's evidence was not admissible to prove non-access. But then suppose it was inadmissible, was there any other evidence on which the magistrates would be justified in acting? I think not, for the only other evidence was that of Mary Thorkell, and I quite agree with my Brother Grove that it is a bold assertion for any witness to make as to so long a period of time that the respondent was never out of her house at night later than eleven o'clock. But, although her evidence seems to shew he was not out later, it does not prove, nor does she attempt to shew that at other periods of the day he might not have visited his wife, as he may have done, having a key to her dwelling.

Case remitted to Justices.

Solicitors for appellants: *Taylor, Hoare, & Taylor, for J. Black.*
Solicitors for respondent: *Cross, Son, & Riley.*

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(1) Law Rep. 10 Eq. 41; 39 L. J. (Ch.) 192.

(2) 5 Ch. D. 545.

1879
June 11.

[IN THE COURT OF APPEAL.]

BELMONTE AND OTHERS *v.* AYNARD AND ANOTHER.
PAUL GÜTSCHOW AND FORD (TRUSTEE) CLAIMANTS.

Practice—Security for Costs—Interpleader Issue—Plaintiff residing Abroad—Nominal Defendant, really Plaintiff.

Where one of the defendants in an interpleader issue is really interested in the result thereof as a plaintiff, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad.

Decision of the Common Pleas Division, ante, p. 221, affirmed.

Appeal of Ford from a decision of Denman and Lindley, JJ., refusing a motion for security for costs.

The facts are fully stated in the report of the proceedings before the Common Pleas Division (1), and it is necessary here only to give the following brief statement of them. An action had been brought in the Mayor's Court, London, in which Ford was plaintiff; this action was afterwards stayed by an order directing an interpleader issue to be tried, in which Belmonte and others, trustees of F. Gütschow, were plaintiffs, and Paul Gütschow, of Japan, and Ford were defendants; but the question as to the validity of Ford's claim could not arise, unless a question between Belmonte and his co-trustees upon the one side and Paul Gütschow upon the other should have been first decided in favour of the former. Belmonte and his co-trustees resided at Hamburg, Ford in London.

Lamaison, for Ford. This case falls within the general rule that where a plaintiff is a foreigner residing abroad he is bound to give security for costs; as a matter of convenience and in order to determine the rights of all the parties in one proceeding, Ford has been made a party to the issue; as he is a defendant, he is entitled to all the protection afforded by the practice of the Court to defendants, who are sued by foreigners residing abroad.

R. V. Williams, for Belmonte and others. In this interpleader issue Ford is really a plaintiff; and one plaintiff cannot call upon another plaintiff to give security for costs.

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(1) Ante, p. 221.

BRAMWELL, L.J. I think that the decision of the Common Pleas Division must be affirmed. Ford in this dispute occupies the position of a plaintiff; if the suit in the Mayor's Court had proceeded, he would have been the plaintiff in it. I incline to think that Ford ought not to have been made a party to the interpleader issue. The Common Pleas Division was right in holding that he was not entitled to security for costs.

BRETT, L.J. The only ground for the application before us is that the plaintiffs in the interpleader issue reside abroad, and that Ford has been made a defendant to it; but he is only nominally a defendant; he is really a plaintiff. The first question to be tried will be between Belmonte and his co-trustees upon the one side, and Paul Gütschow, of Japan, upon the other; if Paul Gütschow succeeds, Ford will have no claim; if, however, the first question is decided in favour of Belmonte and his co-trustees, then a second question will arise between them and Ford; but during the trial of the first question Ford's part will be only passive.

COTTON, L.J. This is an application that the plaintiffs in an interpleader issue be ordered to give security for costs, on the ground that they are foreigners residing abroad. I think that the Common Pleas Division was right in refusing to make an order. The applicant, Ford, is nominally a defendant, but he is really a plaintiff. There are really two issues; in the first Ford has no interest except in common with Belmonte and his co-trustees; but if the issue is decided against Gütschow, of Japan, then the question will arise in which Ford is immediately concerned. It is unnecessary to say whether the form of the issue in the present case is convenient.

Appeal dismissed.

Solicitors for plaintiffs: *Ashurst, Morris, & Co.*
Solicitors for Ford: *Saunders, Hawksford, & Bennett.*

1879
March 22.

[IN THE COURT OF APPEAL.]

BUTTON *v.* O'NEILL.

Bills of Sale Act, 1854 (17 *&* 18 *Vict. c.* 36), *s.* 1—*Affidavit—Description of Residence of Maker—Change of Residence by Maker between Execution and Registration of Bill of Sale.*

5 QBD 57.
21 ChD 871
875-7
2 ChD 138
0 QBD 94

The "description of the residence" of the maker of a bill of sale, required by the Bills of Sale Act, 1854, s. 1, to be stated in the affidavit filed therewith, must be his residence at the time of swearing the affidavit and not of executing the bill of sale.

London and Westminster Loan and Discount Co. v. *Chace* (12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314) disapproved of. 9 Jur. NS. 42

APPEAL by the plaintiff from a rule for a new trial discharged by Lord Coleridge, C.J., and Lopes, J.

This was an interpleader issue. The defendant W. Lane O'Neill, a solicitor, was execution creditor, and the plaintiff claimed under a bill of sale given by the debtor, John Pace, who at the time of executing it was residing at Cranbrook House, Kennington Road, Lower Clapton. After the execution of the bill of sale, but before it was registered, Pace changed his residence to St. Anne's Villa, Wood Green. In the affidavit filed with the bill of sale, Pace was described as "now residing at St. Anne's Villa, Wood Green."

The issue was tried before Hawkins, J., who directed a verdict for the defendant, on the ground that the bill of sale was void under 17 & 18 Vict. c. 36, s. 1, inasmuch as the affidavit filed with it did not state the place of residence of the maker at the time when the bill of sale was made.

The plaintiff obtained an order nisi for a new trial on the ground of misdirection, which was afterwards discharged by the Common Pleas Division.

The plaintiff appealed.

Dec. 14, 1878. *Finlay*, for the plaintiff. The question in this case is, whether the affidavit filed with the bill of sale pursuant to 17 & 18 Vict. c. 36, s. 1 (1) sufficiently states the residence of the maker; the affidavit is true, for he was residing at Wood Green at the time when it was sworn. It will be argued for the defendant that the maker ought to have been described as of Lower Clapton, where he was residing when the bill of sale was given. This contention, however, is erroneous. The material statement as to the residence of the maker is that contained in the affidavit. For the purposes of the Act the description in the bill of sale is irrelevant: *Hatton* v. *English.* (1) The defendant may rely upon *London and Westminster Loan and Discount Co.* v. *Chace* (2); but in that case between the times of making the bill of sale and of swearing the affidavit the grantor, who had previously been following no occupation, became a house and general agent. The decision rather turned upon a change in occupation than upon a change in residence. *Brodrick* v. *Scalé* (3) was a case where the affidavit described the attesting witness as a gentleman, whereas in truth he was an attorney's clerk. *Pickard* v. *Bretz* (4) is similar to *Hatton* v. *English.* (1) The affidavit may sometimes be treated as incorporating the statements in the bill of sale: *Routh* v. *Roublot* (5); *Jones* v. *Harris.* (6)

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(1) By the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, every bill of sale "shall, together with an affidavit of the time of such bill of sale being

[BRAMWELL, L.J. The four cases last cited by the plaintiff's counsel are not material to the present question.]

The defendant in person. The object of the Bills of Sale Act, 1854, was that information might be obtained as to those persons, whose pecuniary difficulties had induced them to execute bills of sale. The register of bills of sale must be correct, for practically that is the test used by the public; and therefore if there be any

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made or given, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale," otherwise such bill of sale shall as against assignees in bankruptcy and execution creditors be void.

The Bills of Sale Act, 1854, was repealed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which, however, in s. 10, contains similar provisions as to registration, the time being reduced from twenty-one days to seven.

(1) 7 E. & B. 94; 26 L. J. (Q.B.) 161. 3 Jur N.S. 394.

(2) 12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314. 9 Jur N.S. 412.

(3) Law Rep. 6 C. P. 98.

(4) 5 H. & N. 9; 29 L. J. (Ex.) 18. 5 Jur N.S. 1134.

(5) 1 E. & E. 850; 28 L. J. (Q.B.) 240. 5 Jur N.S. 548.

(6) Law Rep. 7 Q. B. 157.

(5) Sc nom Roublot v Routh
5 Jur N.S. 545

irregularity in the affidavit, the bill of sale is void: *Murray* v. *Mackenzie.* (1)

[BRAMWELL, L.J. That case is not in point.

COTTON, L.J. In that case the affidavit was inaccurate, and could not be said to truly represent at any time the residences of the maker and attesting witness.]

The rights of the parties are fixed when the bill of sale is executed, and it is material to know the residence of the grantor at that time. If he changes his residence before the affidavit is sworn, there may be a difficulty in identifying him unless the former residence is stated.

Finlay, in reply.

Cur. adv. vult.

March 22. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRAMWELL, L.J. This case is very embarrassing. The question is, whether an affidavit stating truly the residence of the maker of a bill of sale at the time of the affidavit, which was not the residence at the time of the giving of the bill of sale, nor that in the bill of sale, is sufficient under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). Sixteen years ago it was held in *London and Westminster Loan and Discount Co.* v. *Chace* (2) that it was right to state the residence in the bill of sale, if it was truly stated there, though changed at the time of the affidavit; and it was said it would not be sufficient to state it as in the case before us. If this authority had been acted on, most certainly we ought to follow it, for it is obvious that it is of very little consequence which way the law is, and it would be very mischievous to overrule a case so acted on, and thereby invalidate the registration in many cases. But upon inquiry we have found the authority has not governed the practice. On the contrary, the invariable form of the affidavit is to state that the residence of the grantor "is" so and so. Now, if that case was rightly decided, all these affidavits are wrong. For they all speak of the time present, that is, of the swearing of the affidavit, and not of the execution of the bill of sale. The time of each may be the same, but it is not sworn to. The matter will appear plain thus : suppose the affidavit says the residence *is* A., suppose that is the residence stated in the bill of sale, suppose the affidavit is wilfully false, and B. was the residence, suppose an indictment for perjury, there could be no conviction. The defendant would not have sworn what was the residence when the bill of sale was given; he would have sworn what it was at the time of the affidavit; but that, according to the above case, is immaterial. That case, however, also decided that the affidavit was sufficient, though it said "is a gentleman;" and though at the time of the affidavit (which was made some weeks after) the grantor of the bill of sale was in a trade. The difficulty was got over by holding that "is" was bad grammar and meant "was." But, with all respect, the grammar was good enough. It is never a reason for saying that grammar is bad that on the facts appearing the truth would not be expressed by the language used. It is impossible for us to agree with that part of that decision, and we must therefore examine the statute and judge for ourselves. The words are: "Together with an affidavit of the time of the bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same." As was observed in the case cited, the framer of the Act was loose in his language. It is manifest that "the time of such bill of sale being made or given" means the time when such bill of sale was made or given. The language would have been right had it been "of the time of the making or giving of such bill of sale." So of the next words: they should in strictness have been "a description of the residence and occupation of the person *having* made or given the same;" for it is a *past* act. But if there had been those words, it is manifest that the present affidavit would be right. A description of the residence and occupation of a person having done a thing means his residence and occupation at the time of the description. If I were to say to any one, "give me a description of the residence and occupation of the author of the Correlation of Forces," I should not ask for where Grove, J., lived when he wrote and published it, nor what he then was, but where he resides now and what he now is. This is confirmed by the enactment as to bills of sale under executions; for surely, if the execution has been out for a year, as may be the case, it would be the residence when the bill of sale was executed, rather than that when the execution issued, that should be given. We have said that it matters not which way the law is; but if there is a choice, surely, whatever the object of the statute, it is better that as late a description of the maker of the bill of sale as possible should be given; and the affidavit may be later, cannot be earlier, than the bill of sale. What people want to know is, whether A. B., now being so and so, and residing at X., has given a bill of sale, and surely the later they can hear of him the better. If Mary Smith, of A. Street, spinster, marries John Brown, of B. Street, the day after she has given a bill of sale, it would be more easy to trace and identify her if described as Mary Brown, wife of John, of B. Street, than if described, as in the bill of sale, as Mary Smith, of A. Street. We cannot agree in the reasoning of the Court in the case cited. It is to be remembered that the construction there given to the statute and affidavit was admitted to be strained and forced, and was to support the bill of sale, which there has always been a strong tendency to do. It is further to be observed that that decision is in opposition to the opinion of Wightman, J. It is true that two Acts of Parliament as to bills of sale have passed since the case cited, and have not altered the law laid down. It is true, also, that there is language in all the statutes indicating that the framers of them may have thought that residence and occupation in the bills of sale would be given. If that appeared in the first Act it would be a legislative interpretation of its meaning, but it does not; and it is not enough that it appears that the framers of the other Acts thought that it would be so, especially when it is borne in mind that in the immense majority of cases the bill of sale and affidavit are contemporaneous. In the result, we would abide by that case so far as it construes the Act, but for the practice not being in conformity with it; so that we can only uphold a large number of bills of sale by holding, as was done in that case, that the language of the affidavit is ungrammatical. This we cannot do. We must, therefore, dissent from that case and reverse the judgment.

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(1) Law Rep. 10 C. P. 625.

(2) 12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314.

9 Jun 45412.

Judgment reversed.

Solicitors for plaintiff: *Carr, Banister, Davidson, & Morris.*

[IN THE COURT OF APPEAL.]

1879
March 15.

SHAW AND OTHERS *v.* THE EARL OF JERSEY.

20 CLD
507

Practice—Procedure—Injunction—Supreme Court of Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66) *s.* 25, *sub-s.* 8—*Landlord and Tenant—Restraining distress, Terms of—Payment of Rent into Court.*

An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the Court shall think just," under the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66) s. 25, sub-s. 8.

The terms and conditions which the Court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into Court.

Decision of the Common Pleas Division, ante, p. 120, affirmed.

APPEAL by the plaintiffs from so much of an order of Lord Coleridge, C.J., and Denman, J., as directed that an injunction restraining a distress should be dissolved, unless a sum of money should be brought into court within a fortnight.

The facts of the case are stated in the report of the proceedings before the Common Pleas Division (1), and it is only necessary here to make the following short statement of them.

The plaintiffs were assignees of a mining lease granted by the predecessors in title of the defendant. The latter claimed to be entitled under the terms of the demise to additional rent for certain blast-furnaces. A special case was being stated in order to determine the true construction of the lease; but in the meanwhile the defendant threatened to distrain for the rent, which he alleged to be due to him. The plaintiffs applied to the Common Pleas Division to restrain the defendant from distraining until the determination of the special case: but the injunction was granted only upon condition that it should be dissolved if the plaintiffs failed to pay the amount of rent into court within a fortnight.

Harrison, Q.C., and *C. A. Anderson*, for the plaintiffs. A hardship is inflicted upon the plaintiffs by the direction to bring the money into court: they are perfectly solvent, and no injustice will be done by compelling the defendant to wait until the determination of the special case. It is a question of convenience whether the injunction ought or ought not to be granted; and the more convenient course is to allow the injunction to issue unconditionally. The plaintiffs by the order of the Common Pleas Division are put in the same position as if the construction of the lease were clearly against them. An injunction can now be granted against the commission of any legal wrong: *Beddow* v. *Beddow.* (1)

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(1) Ante, p. 120.

C. Bowen, for the defendant was not called upon to argue.

BRETT, L.J. This appeal must be dismissed. A dispute has arisen between the parties as to the construction of the lease of which the plaintiffs are assignees, and no doubt the Judges of the Common Pleas Division might have acted as the plaintiffs' counsel suggest that they ought to have done, and might have granted an unconditional injunction until the hearing and determination of the special case; but they might have altogether refused the plaintiffs' application. In the Common Pleas Division a middle course has been taken; the distress and the consequent injury to the plaintiffs' credit have been prevented, upon condition that the money be brought into court. The argument for the plaintiffs really answers itself; they allege that it is a hardship upon them to be compelled to bring the money into court, and at the same time they assert that they are in good and solvent circumstances; if the plaintiffs really are solvent, they will easily find the amount directed to be paid. However, the legal ground of my judgment is that we ought not to overrule the discretion of the Common Pleas Division: but I wish it to be understood that I do not dissent from the conclusion at which they have arrived.

COTTON, L.J. The only appeal before us is against the terms and conditions upon which the injunction is to issue: the defendant does not dispute the power to grant it. The injunction is claimed under the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 8;

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(1) 9 Ch. D. 89.

but by that enactment a discretion is given to the Court, which is not to be interfered with unless it has been wrongfully exercised. I think that the rent claimed ought to be paid into court. The Common Pleas Division have very properly stopped the defendant from distraining; but if the determination of the special case is in his favour, he ought to have the means of easily obtaining payment of the money. I may remark that there could be no precedent for a case like this before the Supreme Court of Judicature Acts, 1873, 1875; the application is for an injunction against the commission of a threatened trespass; in cases of this description the Court of Chancery usually did not interfere.

THESIGER, L.J. This is not a case of interfering with an ascertained legal right; but the Common Pleas Division was called upon to prevent a distress, for the payment of rent alleged to be due under the terms of a lease, until the right to the money has been ascertained by the decision upon the special case. The order is fair to both parties and proper to be made at the present stage of the proceedings; the plaintiffs are subjected to the burden of bringing the money into court; while the defendant, if his construction of the lease is right, is debarred from the use of the money until the special case has been heard.

Appeal dismissed.

Solicitors for plaintiffs: *Argles & Argles.*
Solicitors for defendant: *Freshfields & Williams.*

1879
June 19.

DE GREUCHY *v.* WILLS AND WIFE.

Husband and Wife—Lex loci contractûs—Conflict of Laws—Liability of Husband married in England for ante-nuptial Debts contracted by Wife in Jersey—Married Women's Property Act, 1870, *Amended Act,* 1874 (37 & 38 *Vict.*) c. 50, s. 2.

By the law of Jersey a husband is liable for the ante-nuptial debts of his wife, and the Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50), does not apply to Jersey:—

Held, notwithstanding, that an Englishman married in England, after the passing of the Act, to a woman who has contracted debts while a feme sole in Jersey, is liable, in an action brought against them in England for those debts, to the extent only of the assets derived from his wife and specified in s. 5 of the Act.

APPEAL by motion under 38 & 39 Vict. c. 50, s. 6, from the county court of Hertford holden at Watford.

The action was to recover 50*l.* for goods supplied by the plaintiff, draper and banker, at St. Heliers, in Jersey to the female defendant when a feme sole. She subsequently came to England and there married the male defendant, an Englishman, after the passing of the Married Women's Property Act, 1870, Amendment Act, 1874. The defendants living within the jurisdiction of the county court were sued therein.

It was admitted that the goods were supplied, and that the balance sued for was still unpaid, and the defendants mainly relied on 37 & 38 Vict. c. 50, limiting a husband's liability for the debts of his wife contracted before marriage. Evidence was then adduced to shew that by the law of Jersey a husband is liable for the ante-nuptial debts of his wife, and that the provisions of the Act do not apply to Jersey. The county court judge nonsuited the plaintiff.

A rule nisi having been granted, calling on the defendants to shew cause why the nonsuit should not be set aside and judgment entered for the plaintiff, or for a new trial on the ground that the decision was erroneous in law,

Broadmead, for the plaintiff, shewed cause, and having stated the point,

1879

DE GREUCHY
v.
WILLS.

THE COURT called on,

Lamaison, in support of the rule. The Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50 (1)), does not apply. Jersey is not within the United Kingdom, and none of the Acts of the English parliament have effect there, unless it is particularly named in them: 1 Steph. Comm. on Blk. 7th ed. p. 101. By the law of Jersey a husband is still liable for ante-nuptial debts of his wife as he lately was in England. His liability is governed by the lex loci contractûs. The lex fori governs only the procedure and not the cause of action: see per Tindal, C.J., *Trimbey* v. *Vignier* (2); *Mostyn* v. *Fabrigas*. (3) The marriage is no part of the cause of action. The cause of action was the contract and debt in Jersey. The husband marrying a foreign woman takes her with her liabilities.

GROVE, J. I am of opinion that the judgment of nonsuit must be affirmed. Goods were supplied by the plaintiff to an unmarried lady in Jersey. She afterwards came to England, and there married an Englishman after the passing of the Married Women's Property Act, 1874 (37 & 38 Vict. c. 50). By the law of Jersey as it stood at the time of the contract, and, as far as I know, at the time of the marriage, a husband is liable for ante-nuptial debts of the wife. By the English law, as it stood at the time of the marriage, a husband is not liable for the ante-nuptial debts of his wife, except to the extent of certain assets derived from her.

No case of the wife having such assets or property to bring to her husband within s. 5 of the Act was sufficiently established.

I think we may assume that after the marriage the husband and wife were domiciled in England, for if they had gone to Jersey they would have been instantly sued there. The question is whether the husband is liable to be sued in this country for the ante-nuptial debt contracted by his wife with the plaintiff? There seems to be no case on the point, but so far as I understand the law I am of opinion that he is not liable. The Courts of this country, as a general although not invariable rule, in examining the validity of a contract test its validity by the lex loci contractûs. Therefore I assume that this lady was primâ facie bound by the contract with the plaintiff, and if she, being a feme sole, had been sued in this country, I should have tested the validity of the contract, not by the law of England, but by the law of Jersey.

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(1) 37 & 38 Vict. c. 50, s. 1, enacts that a husband and wife married after the passing of the Act may be jointly sued for debts of the wife contracted before marriage.

By s. 2 "The husband shall in such action . . . . be liable for the debt to the extent only of the assets thereinafter specified."

Sect. 5 specifies the assets, viz. certain property brought to the husband by the wife.

(2) 1 Bing. N. C. 151.

(3) 1 Sm. L. C. 8th ed. at p. 697.

But is her husband liable? Evidence was given by an expert, who stated that, according to the law of Jersey, a husband is liable for ante-nuptial debts contracted by his wife. So if this lady had been married in Jersey to a Jersey man, or even perhaps to an Englishman, her husband would have been liable for her debts. But since the time of the Married Women's Property Act, 1874, the husband is not liable, save to the extent of the assets specified in s. 5, and there is no evidence of any such assets.

Then the question becomes this: the wife being liable in Jersey, and possibly liable herself in England, if she were a feme sole, can that liability be transferred to and fall on her husband in this country, he not being a Jersey man, or married in Jersey, or party to the Jersey contract, but being an Englishman subject to English law, by which he is not liable? I am of opinion that the husband is not liable. It would be extraordinary if a woman who contracted debts in Jersey carried, as it were, in her blood, and could impose on a husband she marries in England, this liability. It is not within the reason of the doctrine of lex loci contractûs. He was no party to the debts, and had no opportunity of repudiating them. If a man marries a woman in England he knows his liabilities; so if he marries in Jersey he must be presumed to acquaint himself with the law of that island. But how can the Englishman who marries in England be presumed to know the Jersey law? I find no case in which a person has been held liable by the lex loci contractûs who was no party to the contract.

The lex loci contractûs is not by any means a law governing invariably all the incidents of the contract. I find several cases tending to shew that the doctrine is to be applied to the validity of a contract, and not to all its incidents. Lord Robertson in *Edmondstone* v. *Lockhart* (1) said: "The regard which is paid to the lex loci contractûs does not arise from any blind deference to the law of a foreign country, but is founded on the legal presumption that the parties had in view the law of the country where the contract was executed, and intended to bind themselves accordingly."

Apply that test. How can it be said that the husband was a party who had in view the law of the country in which the contract was made, or intended to bind himself by the contract? He did not know of the contract, or of the law of Jersey. There are many cases shewing that the validity of the contract depends on the lex loci contractûs. I find the general proposition laid down by various authorities, amongst others in Wheaton's International Law, 2nd ed. part ii. ch. ii. p. 179: "A contract valid by the law of the place where it is made, is generally speaking, valid everywhere," but that the rule "cannot apply to cases properly governed by the lex loci rei sitæ," or "where it would injuriously conflict with the laws of another state relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority and the rights and interests of its citizens." [The learned judge cited also Huberus De conflictu legum, Lib. i. tit. 3, § 9, and Story's Conflict of Laws, 7th Ed. p. 170.] These authorities shew that although the validity of the contract depends on the lex loci contractûs, yet it by no means follows that all the incidents do so, when the incidents differ from those of the place where the contract was made. For the purposes of this case I admit that there was a valid contract by a feme sole in Jersey, and that the husband would, if married in Jersey, have been liable, but I think that he being married in England, the Jersey law does not apply, and that his liability must be governed by English law, and that we must not fix him with liability because the Jersey woman is assumed to have brought with her the law of Jersey, so as to carry with her all the incidents of the Jersey law as regards herself.

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(1) Fergusson's Reports Consist. Court of Scotland, Divorce, p. 168, at App. p. 396.

Lopes, J. The case raises a question on which there is certainly no direct authority. This was a transitory action. With respect to transitory causes of action which have arisen abroad the Courts of this country entertain them, and in adjudicating on them are governed by the law of the country with reference to which the parties may be deemed to have contracted.

The rule has been laid down that the lex loci contractûs governs the contract but not the remedy. I do not hesitate to say that I have had doubts whether, there being a cause of action against the wife before marriage, the liability of the husband did not, as it were, relate back to this period. If the marriage had been in Jersey he would, I assume, beyond all question have been liable. The incidents of the law of Jersey would have attached. But here the marriage was in England and to an Englishman, and, on the whole, I am inclined to think that the incidents of the marriage were the incidents of the English law, and one of those incidents is that the husband is not liable for the ante-nuptial debts of the wife, except in the events and to the extent specified by the Married Women's Property Act, 1874. In this case there was no sufficient evidence of assets derived by the husband through the wife within the terms of sect. 5. I think the nonsuit was right.

Rule discharged.

Solicitors for plaintiff: *Saunders, Hawkesford, & Bennett.*
Solicitors for defendants: *Walker, Martineau, & Co.*

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1879
March 29.

5CPD48/
491
9QBD6

Local Government Acts—Public Health Acts, 1848, 1858, *and* 1875*—Sewering and Paving—Landlord and Tenant—Covenant to pay Rates, Taxes, and Charges.*

The defendant became tenant of a house under a lease by which he covenanted to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," land-tax, and property-tax excepted. The local board of health gave notice to the plaintiff, as owner (he having acquired the lessor's interest in the premises) to sewer, level, pave, &c., the street in which the house was situate; and, upon his failure to comply with the notice, the board did the work, and made an apportionment upon him in respect thereof, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Acts amending that Act, and he was compelled to pay the amount and interest:—

Held, that this was a "charge upon the premises," or "upon a person in respect thereof," from which by his covenant the defendant undertook to relieve the plaintiff, and therefore the plaintiff was entitled to maintain an action against the defendant in respect of the money and interest so paid by him.

FURTHER CONSIDERATION. The cause was tried at the last assizes at Manchester.

C. Russell, Q.C., and *S. Taylor,* appeared for the plaintiff.

Ambrose, Q.C., and *Edge,* for the defendant.

The facts are fully stated in the judgment, which was delivered by

LINDLEY, J. I am of opinion that the plaintiff is entitled to judgment.

On the 16th of August, 1867, the defendant became tenant of a public-house within the borough of Stockport under a lease by which he was to pay to the lessors the yearly rent of 40*l.*, "free from all present and future parliamentary, parochial, and other taxes, rates, charges, deductions, and impositions whatsoever (the land-tax and property-tax, if any, only excepted)." The lease also contained a covenant by which the defendant undertook to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises or any part thereof, or upon any person or persons in respect thereof (except as aforesaid)."

Prior to the year 1874, a street was made by certain persons unconnected with the plaintiff or defendant, but adjoining the

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demised premises; and such street, as found by the jury, was prior to 1874 existing as a street. In April, 1874, the corporation of Stockport, as local board of health, gave notice under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, to the plaintiff (who had acquired the lessor's interest in the premises), as owner, that he was required to sewer, level, pave, &c., this street. The plaintiff did not comply with the requirement of this notice, and subsequently the required works were done by the corporation; and the proportion of the expenses in respect of these premises was settled by the surveyor of the corporation.

The notice above mentioned was clearly given under the Public Health Act, 1848: it may be doubtful whether the work actually was done under that Act or under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which came into force on the 11th of August, 1875; but, as the provisions of the latter Act (ss. 150 and 257) are, so far as regards this case, identical with those of the former Act and of the Local Government Act, 1858, and as in argument the Acts of 1848 and 1858 were assumed to apply, I shall consider the case as under the Act of 1848 and the Acts amending the same.

The question here is upon the construction of the covenants in the lease. The expense of paving, &c., can scarcely be said to be a rate, tax, or assessment; and hence it only remains to consider whether it was a *charge* "charged or assessed upon the said demised premises, or upon any person or persons in respect thereof."

There is a distinction to be drawn between a charge upon premises and a charge upon a person, as the former would be binding upon the realty, whilst the latter would be a mere personal liability for expenses incurred in respect of the premises; but in this case it may be said that there was a charge upon the premises and a charge upon a person, viz. upon the plaintiff as owner of the premises. By the Public Health Act, 1848, such expenses are to be paid by the owner in default, in such proportion as shall be settled by the surveyor, and such expenses may be recovered from the owner in a summary manner, or the same may be by order of the local board declared private improvement expenses, and be recoverable as in the Act provided. There was no evidence produced to shew that these expenses had been declared private improvement expenses; they were demanded from the plaintiff, and he paid them with interest due under the provisions of the Act to which I shall now call attention.

By the Local Government Act, 1858, which made corporations the local boards of health in boroughs, it was provided (s. 62), that, "where the local board has incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848; and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5*l.* per cent. per annum till payment thereof." Now, these expenses paid by the plaintiff were incurred in respect of the demised premises, and by the terms of the above section were a charge upon the premises until payment. The fact of the plaintiff paying them because he was compellable by law to do so, does not make them any the less a charge on the premises within the meaning of the covenant in the lease; and hence I am of opinion that the plaintiff is on this ground entitled to recover.

But I think the plaintiff is also entitled to recover because these expenses were a charge upon "a person in respect of the premises," i.e. they were a debt payable by the plaintiff in respect thereof. The plaintiff, by the Public Health Act, 1848, had a duty cast upon him to pave, &c., and he neglected to perform that duty, and in consequence this expense was incurred by the corporation: this expense, then, became chargeable by the corporation to the plaintiff, and it was so chargeable in respect of these premises. In *Tidswell* v. *Whitworth* (1), it was held that, where the Act imposed upon the landlord the duty of performing the work, it could not be said that, upon the corporation charging the landlord with the expenses, these expenses could be called "taxes, rates, assessments, or impositions payable in respect of the

(1) Law Rep. 2 C. P. 326.

premises;" but that such expenses were payable in respect of the owner's default to do the work. But the covenant in the lease in that case did not contain the words "charged upon any person or persons in respect thereof;" and in subsequent cases these words are shewn to be important. *Thompson* v. *Lapworth* (1), although distinguised from *Tidswell* v. *Whitworth* (2) on the ground that there was no duty on the part of the landlord to do the work, was also distinguished on the ground that the covenant there contained words by which the tenant undertook to pay "all taxes, &c., which should be taxed, &c., on the tenant or landlord of the premises;" and this distinction is pointed out in *Rawlins* v. *Briggs.* (3) In *Crosse* v. *Raw* (4), the tenant had covenanted to pay all "outgoings which should at any time during the said demise be taxed, rated, charged, assessed, or imposed upon the said demised premises or *upon the landlord or tenant* in respect thereof." Now, there, the local board had the right to compel the owner to make a drain connecting with the main sewer, or, in default, to do it themselves. Bramwell, B., there says: "It is said it was the duty of the defendant (the landlord) to make the drain, and that, if he had done so, the expense would not have been an outgoing "taxed, rated, charged, assessed, or imposed" upon or in respect of the premises. Now, the point so stated seems to be scarcely arguable; for, the argument in substance is, that, if the local board had a right to make the drain in the first instance, and charge the expense on the defendant, it would be an outgoing imposed on the landlord in respect of the premises; but, if they had a right to compel the defendant to do it, and he did it, it would not be an outgoing imposed on him in respect of the premises. This seems preposterous. It would certainly be something which had gone out,—an expense which he had been at in respect of the premises; and it would have been an expense imposed on him."

In this case, whether the plaintiff had done the work himself or paid the expense of its being done by the corporation, he would have done either by compulsion, and the cost of so doing would have been a charge charged upon him in respect of the premises.

(1) Law Rep. 3 C. P. 149.
(2) Law Rep. 2 C. P. 326.
(3) 3 C. P. D. 368.
(4) Law Rep. 9 Ex. 209.

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Hence, I am of opinion that there must be judgment for the plaintiff, for 68*l.* 17*s.* 3*d.*, and 2*l.* 11*s.* for interest.

Judgment accordingly.

Solicitors for plaintiff: *Hughes & Son for A. F. Vaughan, Heaton Norris, and Stockport.*

Solicitors for defendant: *Norris, Allens, & Carter, for Diggles & Ogden, Manchester.*

May 12.

DIXON *v.* WHITWORTH.
DIXON *v.* THE SEA INSURANCE COMPANY.

Insurance (Marine)—Insurable Interest—Salvage—Costs of Salvage Suit—Suing and Labouring Clause.

The plaintiff agreed with one W. for a sum of 10,000*l.* to transport the obelisk known as "Cleopatra's Needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. He accordingly placed it in an iron case which he named *The Cleopatra*, shaped somewhat like a ship, with a small deck and a mast and steering apparatus, and engaged a steam-vessel called the *Olga* to tow it to England. To cover the expenses (about 4000*l.*) incurred by him in getting the obelisk afloat, and the cost and risk of the voyage to England, the plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandizes in the good ship or vessel called *The Cleopatra* iron vessel containing the obelisk . . . . valued at 4000*l.* . . . . against the risk of total loss only;" the risks insured against being the ordinary sea risks, and the suing and labouring clause being in the ordinary form.

In the course of the voyage *The Cleopatra* got adrift in a storm in the Bay of Biscay, and the *Olga* after some ineffectual attempts to recover her proceeded to England without her. *The Cleopatra* was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim for salvage. A suit was afterwards instituted by the salvors in the Admiralty Court, London, in which they claimed 25,000*l.* for salvage services. The Court awarded them 2000*l.* and costs.

In actions upon the policies:—

Held,—1. That the plaintiff, being the owner of *The Cleopatra*, and having possession of the obelisk, and (possibly) a lien upon it for his expenditure, had a sufficient insurable interest, at least to the extent of his outlay:

2. That the true effect of both policies was, an insurance, not on "cargo" or "freight" only, but on the vessel and her cargo:

3. That, under the suing and labouring clause, the assured was entitled to recover the 2000*l.* awarded to the salvors, but not the costs of the proceedings in the Admiralty Court, nor the expenses incurred by him in re-fitting *The Cleopatra* at Ferrol and towing her to London.

Revd on appl

ACTIONS upon two policies of insurance, the terms of which and the circumstances under which they were effected are sufficiently stated in the judgment. The causes were tried together before Lindley, J., at Westminster on the 26th of March, 1879, and were argued upon motions for judgment on the 26th of April and the 3rd of May by *Butt, Q.C.*, and *Gainsford Bruce*, for the plaintiff, and by *C. Russell, Q.C., J. C. Mathew*, and *Myburgh*, for the defendants. The following authorities were referred to:—

For the plaintiff,—*Mors-le-Blanch* v. *Wilson* (1); *Rolph* v. *Crouch* (2); *Xenos* v. *Fox* (3); *Dent* v. *Smith* (4); *Watson* v. *Marine Insurance Co.* (5)

For the defendants,—*Dickinson* v. *Jardine* (6); *The Pyrennee* (7); Lowndes on Average, 4th ed. p. 231.

Cur. adv. vult.

May 12. LINDLEY, J., delivered judgment.

These are actions brought by an assured against the underwriters of two marine policies, in respect of losses occasioned by the accident which befel the celebrated Cleopatra obelisk on her voyage from Alexandria to this country.

The plaintiff is a civil engineer; and it appears from his evidence that he was desirous of seeing the obelisk brought over to England, and had a conversation with Mr. Erasmus Wilson on the subject. Ultimately, by an agreement dated the 31st of January, 1877, and made between Mr. Wilson of the one part and the plaintiff (Mr. Dixon) of the other part, it was in effect agreed that Mr. Dixon should at his own expense and risk transport the obelisk to London and erect it there uninjured, and that, in the event of his succeeding, Mr. Wilson should pay him 10,000*l.* Mr. Dixon, however, was to incur no liability to Mr. Wilson in the event of failure in the enterprise. On the other hand, Mr. Dixon was to have no claim whatever against Mr. Wilson except in the event of success. Further, it appears from Mr. Dixon's evidence that he did not anticipate any profit to himself from the transaction: in other words, it was not expected that the 10,000*l.* would more than cover the expenses.

The only evidence before me respecting the ownership of the obelisk is the plaintiff's statement that there was a dispute about it, and the Khedive presented it to the British nation, and handed it to him, the plaintiff, on their behalf.

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(1) Law Rep. 8 C. P. 227.

(2) Law Rep. 3 Ex. 44.

(3) Law Rep. 3 C. P. 630; 4 C. P. 665.

(4) Law Rep. 4 Q. B. 414.

(5) 7 Johns. (N.Y.) 61.

(6) Law Rep. 3 C. P. 639.

(7) Br. & L. 189.

Having made the above agreement, Mr. Dixon commenced to prepare for the transport of the obelisk. He spent considerable sums of money and much labour in doing this, and he built the vessel called *The Cleopatra.* This was in fact little more than an iron case in which the obelisk was stowed and in which it would float. The vessel had no other use, and was fit for no other purpose. The vessel was quite subordinate to its cargo, and the cost of its construction was for all practical purposes nothing more than part of the cost of transporting the obelisk.

In September, 1877, the obelisk was in its case, or, in other words, was on board *The Cleopatra,* and was ready to be towed to England. On the 15th of September, an agreement was entered into between the owners of the steam-ship *Olga* of the one part and Mr. Dixon of the other part, for the towage of *The Cleopatra* with the obelisk on board from Alexandria to London, for the sum of 900*l.*

The expenses and liabilities which Mr. Dixon had incurred up to this time in constructing the vessel, in getting the obelisk on board, in properly stowing it there, and in providing for its transport, were estimated by him at 4000*l.*, and did in fact amount to about this sum.

On the 20th and 21st of September, 1877, the policies on which these actions were brought were effected by Messrs. Barr & Co. for Mr. Dixon. I will presently state their language and legal effect.

The Cleopatra and the obelisk left Alexandria on the 21st of September, 1877, in tow of the *Olga.* All went well until the 14th of October, when a severe storm was encountered in the Bay of Biscay, and the *Olga* was compelled to cast *The Cleopatra* off. On the 15th the *Olga* took the crew of *The Cleopatra* on board, and afterwards lost sight of her, and, having vainly endeavoured to find her, gave up the search and came on to England without her. On the evening, however, of the same day, the steamer *Fitzmaurice* fell in with *The Cleopatra,* and, after great risk and labour, succeeded in saving her and in towing her into Ferrol. *The Cleopatra* and obelisk afterwards reached London in safety.

The Court of Admiralty awarded salvage to the *Fitzmaurice.* For the purpose of determining the amount to be awarded, the obelisk was estimated to be worth 25,000*l.*, and the sum awarded to the salvors was fixed at 2000*l.* This sum the plaintiff paid. He also paid the costs of the proceedings in the Admiralty, and certain expenses in refitting *The Cleopatra* at Ferrol, and in towing her with the obelisk from that port to London. The present actions are brought to recover contribution from the underwriters in respect of these salvage and other expenses. The policies on which the actions are brought, are worded as follows:—

Whitworth's policy is for 1000*l.* "upon the goods and merchandizes in the good ship or vessel called *The Cleopatra* iron vessel, containing the Cleopatra obelisk." "The goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at 4000*l.*" "Vessel and obelisk being insured against the risk of total loss only." The risks insured against are the ordinary sea risks; and the suing and labouring clause is in the ordinary form.

The Sea Insurance Company's policy is for 2000*l.*, "upon any kind of goods and merchandizes, and also upon the body, &c., of and in the good ship or vessel called *The Cleopatra* iron vessel, containing the Cleopatra obelisk." "The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and the company in this policy, are and shall be, vessel and obelisk valued at 4000*l.*" This policy also is against total loss only. The clauses relating to the risks insured against, and the suing and labouring clause, are in the ordinary form.

The actual wording of the suing and labouring clause was in both policies as follows:—"And, in case of any loss or misfortune, it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandizes, or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured."

Although the language of the first policy is not quite clear as regards the subject-matter insured, I think the first policy is on both ship and cargo, and not on cargo only. The second policy is clearly on both.

The plaintiff's interest in *The Cleopatra* and obelisk were as follows:—He was owner of *The Cleopatra:* he was not owner of the obelisk; but he had spent money upon it, had possession of it, and probably had a lien upon it for his expenditure. Taking *The Cleopatra* and obelisk together, the value of his interest in them at the date of the policies was 4000*l.* This was all he had at risk, and all that was worth insuring. It is true, that, in certain events, he might become entitled to 10,000*l.* under his agreement with Mr. Wilson: but this sum was only calculated to cover expenses; and Mr. Dixon, as a prudent man, would hardly incur further expense until the risks of the voyage were over. I regard the policies as being exactly what they purport to be, viz. policies on the obelisk and the vessel it was in; and I regard Mr. Dixon as having an insurable interest in them to the extent of 4000*l.*, and as having insured that interest by the policies. The description in the policies is sufficient in my opinion to cover that interest: *M'Kenzie* v. *Whiteworth* (1) shews that it is sufficient to specify the subject-matter of insurance, and that it is not necessary to describe the assured's interest in it, unless his interest is such as to affect the risk insured against; which was not the case here.

It was suggested that these policies ought to be regarded as analogous to policies on freight to be earned on the safe arrival of cargo; but, in my judgment, this is not the correct view: the analogy is too fanciful and far-fetched to be of any practical use. The true effect of the policies is in my opinion what I have above described.

The first question which arises, is, whether the underwriters are bound to pay anything in respect of any of the expenses to recover which the actions are brought. These expenses are,—1. The 2000*l.* paid for salvage,—2. The costs of the proceedings in the Admiralty,—3. The expenses of re-fitting at Ferrol and of towing from that port to England. It will be convenient to consider each of these in turn.

1. As to the 2000*l.* paid for salvage:—The policies are against the risk of total loss only. Neither *The Cleopatra* nor the

(1) Law Rep. 10 Ex. 142; 1 Ex. D. 36.

obelisk was totally lost: both were in fact saved; and the defendants therefore contend that they are under no liability whatever. But, although there was no total loss, it is clear beyond all doubt that *The Cleopatra* and her cargo were in imminent danger of destruction, and were saved from total loss by the services of the salvors. The underwriters, therefore, have had the benefit of these services, and are bound in my opinion to indemnify the plaintiff against his liability in respect of them. It is true that the language of the suing and labouring clause does not in terms extend to any services except those rendered by the assured, their factors, servants, and assigns: and it is also true that the salvage services in this case were not rendered by Mr. Dixon, nor by any factor, servant, or assign of his, unless the salvors are to be regarded as having been his agents by necessity or by ratification. But, without discussing how far the salvors can properly be regarded as agents, I take it to be settled that the suing and labouring clause ought to be construed to cover expenditure which the assured necessarily became liable to pay, by way of salvage in respect of preservation from loss which if it had occurred would have fallen on the underwriters: see *Lohre* v. *Aitchison* (1); *Kidston* v. *Empire Marine Insurance Co.* (2) In truth, Mr. Russell did not seriously contest this point, although he thought it his duty to submit it to the Court for decision. The same case of *Lohre* v. *Aitchison* (1) shews that this clause is operative even although there is no total loss, and nothing abandoned to the underwriters: and in my opinion they are bound by this clause to indemnify the plaintiff, in proportion to the sums they respectively insured, against his loss of the 2000*l* awarded for salvage.

2. As regards the costs of the Admiralty proceedings,—I am of opinion that the underwriters are not liable for these costs, or any part of them. I quite accede to the view that they were necessarily and properly incurred in ascertaining the proper amount of salvage to be paid; and I agree in the observation that, in order to enable Mr. Dixon to get the obelisk out of the hands of the salvors, it was as necessary to pay or secure their costs as to pay or secure the salvage itself. But the costs which Mr. Dixon has

(1) 3 Q. B. D. 558, 566.

(2) Law Rep. 1 C. P. 535; 2 C. P. 357.

had to pay are not in my opinion charges incurred by him to avert a loss insured against, or, at all events, they are too remotely so to be covered by the words of the policies before me. The suing and labouring clause is silent about costs; and no authority has been produced in which costs have been recovered under it. I do not regard *Xenos* v. *Fox* (1) as conclusive against the plaintiff on this point; but it certainly is rather against him than for him: and the fact, that the suing and labouring clause did not cover such losses as are now usually provided for by the collision clause, goes far to shew that the costs which I am considering cannot be thrown on the underwriters. Their contract does not cover them.

3. As regards the expense of re-fitting at Ferrol, and towage from that port to London, I am of opinion that these matters cannot be thrown on the underwriters. They were not incurred by Mr. Dixon to avoid a total loss by perils of the sea of the obelisk or of his interest in it. They were not incurred until after the obelisk had been saved. It is true that Mr. Dixon would have lost the benefit of his agreement with Mr. Wilson if he had not got the obelisk home. But, as has been seen, he did not insure the benefit of that agreement; and, as soon as the obelisk was saved, the interest in it which he insured by the policies was saved also. These policies are against total loss only; and any loss sustained by the plaintiff in getting the obelisk home after it was safe at Ferrol must be borne by him: see *Great Indian Peninsular Railway* v. *Saunders.* (2)

I pass now to the next and last question which arises, viz. whether the plaintiff is entitled to recover in respect of the whole 2000*l.* or only in respect of some portion of that sum, viz. in respect of what, as between himself and the other persons interested in the obelisk, would be his proper proportion, supposing the obelisk to have been uninsured.

This question depends on the true construction and effect of the suing and labouring clause, and, curiously enough, appears never yet to have been decided,—at least, in this country. The language of the clause is in favour of the plaintiff, and so in my opinion is its true effect. By it the underwriters agree to contribute in proportion to the amount subscribed to such charges as the assured shall be put to in preventing a loss which, if not prevented, would fall on the underwriters. There are no words to the effect that the assured shall only be repaid such proportion of those charges as, on an equitable adjustment between himself and others, would fall on him alone. The agreement is, to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services; each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorizes the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides himself are interested in that thing. Further, it is now clearly established that this clause is a distinct and independent agreement, which, although occurring in and forming part of the policy, may entitle the assured to recover more than the amount underwritten: see *Lohre* v. *Aitchison.* (1) Having regard to this principle, and to the language and known object of the clause, I am of opinion that, whatever services or charges of the assured fairly come within it must be paid for by the underwriters in proportion to their subscriptions. This view is in accordance with that adopted by Chancellor Kent, in *Watson* v. *Marine Insurance Co.* (2); and, although that decision is controverted by Mr. Phillips, § 1742, note 5, and by Mr. Lowndes, Law of Average, 4th ed. p. 231, I am of opinion that Chancellor Kent's view is more in accordance with the true intent and meaning of the suing and labouring clause than are the views of his critics. They do not, I think, attach sufficient importance to the clause being a distinct agreement to pay for services rendered to avoid a loss insured against.

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(1) Law Rep. 3 C.P. 630; 4 C.P. 665. 218; 2 B. & S. 266; 31 L. J. (Q.B.) 206.

(2) 1 B. & S. 41; 30 L. J. (Q.B.)

The underwriters will be at liberty, on paying Mr. Dixon, to enforce such rights, if any, as he may have against other persons in respect of their proper shares of the salvage expenses: see *Dickinson* v. *Jardine* (3); and, although in this particular case those rights will probably be of no avail, yet, whatever they may be worth, the underwriters will be entitled to enforce them.

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(1) 3 Q. B. D. 558.

(2) 7 Johns. (N.Y.) 57.

(3) Law Rep. 3 C. P. 639.

In the result, my judgment is for the plaintiff for 500*l.* against the defendant Whitworth, and for 1000*l.* against the defendants The Sea Insurance Company, these sums being their respective shares of the 2000*l.* In each action the defendants must pay the costs.

Judgment accordingly.

Solicitors for plaintiff: *Argles & Argles.*

Solicitors for the Sea Insurance Co.: *Rowcliffes, for Stone & Fletcher, Liverpool.*

Solicitors for Whitworth: *Robinson & Hodding, for Bateson & Co., Liverpool.*

CAREY *v.* BARRETT.

May 30.

Debtor and Creditor—Composition Agreement, Construction of—Payment under Pressure.

At a meeting of the defendant's creditors, the following agreement, to which the plaintiff was an assenting party, was made and signed by all the creditors present:—"We the undersigned creditors of W. B., in consideration of 10*s.* in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."

At the time of entering into this agreement, it was known that the debtor was being sued in a county court by one P. as executor of a creditor for a small sum which was afterwards paid in full the day before the cause was ripe for trial:—

Held, that the agreement was limited to the creditors signing it; and that, even if it were not so, the payment to P. being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void.

THIS was an action brought by the plaintiff in the Tunbridge Wells county court against the defendant, to recover interest alleged to be due under an indenture of mortgage of the 16th of May, 1873, made between the plaintiff of the one part and the defendant of the other part, whereby, after reciting that the defendant was indebted to the plaintiff in 155*l.* 17*s.* 9*d.*, certain freehold land and houses were granted to the plaintiff, subject to two prior mortgages for 1000*l.* and 100*l.* respectively. The indenture contained a covenant for payment of the principal on a given day and interest at 5*l.* per cent. half-yearly.

On the 6th of June, 1873, the defendant called a meeting of his creditors, at which meeting the plaintiff was present, when the following agreement was come to, and signed by all the creditors then present,—"We the undersigned creditors of William Barrett, of Tunbridge Wells, coal-merchant and builder, in consideration of 10*s.* in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said William Barrett: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."

The plaintiff signed the agreement as a creditor for 155*l.* 17*s.* 9*d.*, and received the dividend 77*l.* 18*s.* 10*d.* Against his name in the list of creditors was a note or memorandum, "Security to be given up and cancelled." The mortgage-deed, however, was not given up.

At this time Pink, the executor of one Powell, a creditor of Barrett for 12*l.* 11*s.* 6*d.*, was suing him in the county court. Pink was no party to the composition; and on the 11th of June, which was the day before the action was set down for trial, the defendant paid this claim in full by payment into court of 12*l.* 11*s.* 6*d.*, with 14*s.* for costs. The existence of this debt was known to the other creditors at the time of the agreement for the composition.

This action was brought to recover 17*l.* 9*s.* 4*d.* for interest due on the balance of the mortgage money, from the 16th of May, 1873, to the 16th of May, 1878. At the trial in the Tunbridge Wells county court on the 17th of April last, the judge held that the plaintiff was not bound by the composition agreement, inasmuch as the condition,—"the whole of the creditors receiving not exceeding a like sum in discharge of their debts,"—was broken: and he accordingly gave judgment for the plaintiff for the amount claimed and costs.

An order nisi was on the 24th of April obtained at chambers to enter judgment for the defendant, on the ground that the judge's ruling as to the construction of the agreement was erroneous.

Willis, Q.C., and *E. Baldock Stone*, shewed cause. The condition upon which alone the plaintiff consented to take 10*s.* in the pound for his debt having been broken by payment to one creditor of his debt in full, he is remitted to his original rights, and was not bound to deliver up the security to be cancelled.

[LINDLEY, J. Do you find any case where an agreement for a composition has been held void on such a ground, in the absence of any pre-existing arrangement with one creditor that he shall receive more than the rest?]

No: but this is the ordinary stipulation in all agreements for composition. "The whole of the creditors" could not mean "all those who had consented to take 10*s.* in the pound:" *their* debts were satisfied.

H. Matthews, Q.C., and *English Harrison*, contrà. An agreement entered into between a debtor and any number of his creditors less than the whole number, to take a composition for their debts, is binding upon those who enter into the agreement: *Norman* v. *Thompson.* (1) The agreement here, which is very informal, applies to the signing creditors only. If the payment in full to Powell's executor had been the result of a previous understanding that he should receive twenty shillings in the pound, the composition purporting to bind *all* the creditors, the plaintiff's contention might have been well founded. But here there is no suggestion of fraud or concealment; and the payment was not a voluntary one, but made for the purpose of avoiding unnecessary costs in an action to which there was no defence. The agreement, even if applicable to creditors who were not parties to it, is not avoided by such a payment as that. And see Chitty on Contracts, 7th ed. p. 641; Leake on Contracts, 404; *Knight* v. *Hunt.* (2)

LORD COLERIDGE, C.J. I do not pretend to say that this is by any means a clear instrument; but I have come to the conclusion, though not without some doubt, that the view taken by the county court judge was wrong. It is a document whereby certain creditors of Barrett (whose claims amount in the aggregate to a considerable sum) agree to take 10*s.* in the pound in discharge of their debts.

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(1) 4 Ex. 755.

(2) 5 Bing. 432.

They grant the debtor a release, "on the understanding that no concealment or fraud has been practised by Barrett." Then come these words, "the whole of the creditors receiving not exceeding a like sum in discharge of their debts." The real question is whether the meaning of the document is that *no* creditor is to receive more than 10*s.* in the pound, whether party to the arrangement or not. I agree that, if that were the true interpretation, the voluntary payment to any one of them of more than the stipulated sum would be a fair ground for impeaching the agreement. I am not aware of any distinct authority for it; but I believe that the general understanding of the profession has been that a payment in excess made afterwards will not avoid the composition, unless made in pursuance of a previous understanding. It seems to me that to construe the concluding words of the memorandum to refer only to those creditors who sign it will be giving it a sufficient sense. The creditors who are assenting parties may very well agree to relieve the debtor of half their debts, provided it be understood that no signatory shall receive a larger dividend than the rest. The plaintiff seeks to impeach the transaction, because the executor of Powell who had a small claim against Barrett had sued him in the county court, and, the case being on the eve of trial, the debtor, having no defence, paid the debt. This was not the less a payment under process of law, because the debtor did not wait to incur the expense of a judgment and execution. And this for anything that appeared was known to all the signatories at the time. Is that such a payment as vitiates the agreement? If the stipulation at the end means *all* the creditors, we need not discuss it. I think fairly read it means all us signatories. It may fairly mean, no creditor shall by virtue of this agreement receive more than 10*s.* in the pound. Pink's demand was not satisfied under and by virtue of the agreement. I cannot think that the construction sought to be put upon the agreement by Mr. Willis is a reasonable one. It is very unlikely that such a bargain would have been made. I think the judgment must be reversed.

LINDLEY, J. The case is certainly not free from doubt. My reason for concurring in the opinion expressed by my Lord is, that, if the signing creditors intended to make the release conditional, they have not done it in clear and unambiguous language. This is to be considered, that we are in absolute ignorance of the state of the debtor's affairs at the time: but we know this, that there was no fraud or concealment. Assuming, then, that he had made a full disclosure, did the creditors mean that the arrangement should go for nothing if the claim of Powell's executor were not included in it? An executor can only under very exceptional circumstances justify the acceptance of a composition. I must say I was much struck with the change of language here: the document speaks in one part of "our debts," and in another of "their debts." Each alternative seems to me to be full of difficulty. But, upon the whole, I have come to the conclusion that these parties intended to release Barrett from their respective debts; and that, if they meant to make that release conditional, they have not used apt language to make it so. Upon these grounds I think the view taken by my Lord is the right one, and that the decision of the county court judge must be reversed, though, as the matter is so doubtful, I think there should be no costs.

Judgment reversed.

Solicitors for plaintiff: *Stone & Simpson, Tunbridge Wells.*
Solicitor for defendant: *George Burton, Tunbridge Wells.*

CHATFIELD *v.* SEDGWICK.

June 16.

Post 460

Practice—Costs—Counter-claim—County Courts Act, 1867, s. 5.

The plaintiff claimed 57*l.* 10*s.*, and established his claim, on a reference to a master, to the extent of 16*l.* 1*s.* 5*d.* The defendant established his counter-claim to the extent of 23*l.*, leaving a balance in his favour of 6*l.* 18*s.* 7*d.*:—

Held, that the defendant was entitled to his costs.

THE plaintiff sued the defendant for 57*l.* 10*s.* The defendant counter-claimed in respect of payments alleged to have been made by him on account, for which the plaintiff had not given him credit.

The cause was referred to a master under s. 3 of the Common Law Procedure Act, 1854, and was heard before Master Dodgson on the 18th of February, 1879, and subsequent days. By his certificate the master found a balance of 16*l.* 1*s.* 5*d.* to be due to the plaintiff in respect of his claim, and 23*l.* to the defendant in respect of his counter-claim, leaving a balance in favour of the defendant of 6*l.* 18*s.* 7*d.*, and he ordered the plaintiff to pay the costs of the reference.

The defendant's costs having been taxed, the plaintiff took out a summons for a review of the taxation, on the ground that, having recovered less than 20*l.*, the defendant was disentitled to costs of the action by the operation of the County Courts Act, 1867, s. 5. The judge made no order; whereupon the plaintiff appealed.

Mugliston, for the plaintiff. The defendant was not entitled to costs. In respect of his counter-claim a defendant becomes for this purpose a plaintiff: Order XIX, r. 3; *The Julia Fisher* (1); *Original Hartlepool Collieries Co.* v. *Gibbs* (2); *Winterfield* v. *Bradnum.* (3) In the last-mentioned case, Brett, J., says: "A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits, which, for convenience of procedure, are combined in one action." And see *Potter* v. *Chambers.* (4)

[LORD COLERIDGE, C.J. *Blake* v. *Appleyard* (5) is against you; and that case is not inconsistent with *Staples* v. *Young.* (6)]

The plaintiff, claiming a larger sum than 50*l.*, was bound to come to a superior Court. It would be a great hardship if he were to be deprived of costs because he has recovered less than 20*l.*, whilst the defendant who has recovered only 6*l.* 18*s.* 7*d.*, gets them.

LORD COLERIDGE, C.J. It may be that the plaintiff is placed in a situation of hardship because he is within the operation of s. 5 of the County Courts Act, 1867, by reason of his having recovered less than 20*l.*, whereas the defendant, who by his counter-claim becomes for some purposes a plaintiff, gets his costs though he fails to establish his counter-claim to the extent of 20*l.*, because he is not within the Act. I can only say that I decline to restrain the plain words of an Act of Parliament because they may operate hardly.

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(1) 2 P. D. 115.

(2) 5 Ch. D. 713, at p. 718.

(3) 3 Q. B. D. 324.

(4) 4 C. P. D. 69.

(5) 3 Ex. D. 195.

(6) 2 Ex. D. 324.

GROVE, J. It is clear upon the decided cases that the defendant was entitled to his costs.

LOPES, J. The answer to this motion is that the case of a defendant's counter-claim is not within the County Courts Act, 1867.

Motion dismissed.

Solicitors for plaintiff: *Mills & Co.*
Solicitor for defendant: *T. J. Pullen.*

NORTHCOTE *v.* DOUGHTY.

June 10.

5CPD416-
415.-6,-8,

Infancy—Promise of Marriage—Ratification—Infants Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 2—*Fresh Promise, Evidence of—Question for Jury.*

The defendant during his infancy made an offer of marriage to the plaintiff, which she accepted subject to the approval of his parents. He afterwards gave her an engaged ring, which she wore; and two days before he attained his majority he went into the country to visit his father, and on his return (the day after he came of age) he saw the plaintiff and told her that he had explained all to his father, and that he assented to the engagement,—adding, "Now I may and will marry you as soon as I can:"—

Held, that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the Infants Relief Act, 37 & 38 Vict. c. 62, s. 2.

Coxhead v. *Mullis*, 3 C. P. D. 439, distinguished.

ACTION for breach of promise to marry. The cause was tried before Lopes, J., at the last Michaelmas Sittings at Westminster. The evidence was as follows:—

The acquaintance between the plaintiff and the defendant commenced early in January, 1877. On the 9th of March in that year the defendant asked the plaintiff to marry him, to which the plaintiff answered, "Yes, if your parents consent." On the 6th of April the defendant gave the plaintiff an "engaged ring," which she continued to wear until the engagement was broken off. On the 17th of April the defendant went to his parents' house in Shropshire to celebrate his twenty-first birthday; and on the 18th he wrote to the plaintiff, saying that "he had told his father and mother all about it; and now he was the happiest fellow on the face of the earth." The defendant came of age on the 19th or 20th of April, and on the latter day, according to the plaintiff's evidence, he said to her, "Now I may and will marry you as soon as I can;" and the relations between the parties continued as before. The plaintiff's statement as to the conversation on the 20th of April, 1877, was corroborated by her mother and her sister.

The defendant swore that the plaintiff's acceptance of his offer on the 9th of March, 1877, was unconditional; his version of the transaction being this,—"I asked her in the morning if she would marry me, and she said she would give me an answer in the evening; and in the evening she said yes, and sealed it with a kiss." He admitted that the statement in his letter of the 18th of April was untrue.

It was submitted on the part of the defendant that the promise on the 20th of April, 1877, was a mere ratification of the promise previously made by him on the 9th of March, when he was under age, and was therefore invalid by reason of the provision in 37 & 38 Vict. c. 62, s. 2,—citing *Coxhead* v. *Mullis* (1); and that, if there had been a second promise, there was no consideration for it.

For the plaintiff it was insisted that the promise of the 9th of March, 1877, was conditional only on the defendant obtaining the consent of his parents; and that the only absolute promise was that of the 20th of April, when the condition was fulfilled, and the defendant had attained his majority.

The learned judge left the following questions to the jury,—1. Was any promise of marriage made by the defendant to the plaintiff before the 20th of April, 1877? If so, was it absolute or conditional?—2. Was there a new absolute promise then or afterwards? Was what then occurred merely a ratification of a promise made during infancy?—3. Did the defendant break his promise?—4. Did the parties mutually release each other before a breach on either side?

To these questions the jury answered,—1, That the first promise was conditional,—2. That another promise was made on the 20th of April,—3. That the defendant broke it,—4. That there was no mutual release: and they assessed the damages at 75*l.*

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(1) 3 C. P. D. 439.

Nov. 30, 1878. *Yelverton* obtained an order nisi for a new trial on the ground of mis-direction. He submitted that the learned judge should have told the jury that what took place between the parties after the defendant had attained his full age could only be a ratification of his original promise. He cited *Maccord* v. *Osborne.* (1)

March 12 and June 10. *Kisch* shewed cause. The contract or promise of the 9th of March, 1877, was conditional only. That of the 20th of April, therefore, could not be a mere ratification; it was a new absolute and unconditional promise to marry, the defendant being then in a position to make such a promise: *Harris* v. *Wall* (2); Leake on Contracts, 2nd ed. 187. In *Coxhead* v. *Mullis* (3) there was no new promise. It is enough, however, to say that it was a question for the jury, and that their finding is conclusive.

Yelverton, in support of the rule. If the first promise was conditional, it was a condition enuring to the plaintiff's benefit, which she might waive. Whether or not it was a binding promise on the defendant's part was a question for the judge and not for the jury. The substance of what took place between the parties anterior to the 20th of April was this,—In answer to the offer of marriage, the plaintiff says, "I (now) promise to marry you when your parents consent;" or, in other words, "We are engaged, but the engagement cannot be fulfilled until your parents consent."

[LOPES, J. That would be a conditional promise. If it be a question quo animo the promise was made, surely that is for the jury.]

If the promise of the 20th of April was a fresh promise, where is the consideration for it, unless it relates back to the promise of the 9th of March? [The following authorities were cited:—*Hutton* v. *Mansell* (4); *Thrupp* v. *Fielder* (5); *Cole* v. *Catting-*

(1) 1 C. P. D. 568.

(2) 1 Ex. 122.

(3) 3 C. P. D. 439.

(4) 3 Salk. 16.

(5) 2 Esp. 627.

ham (1); *Harvey* v. *Johnston* (2); *Carter* v. *Scargill* (3); Story on Contracts, § 70.

DENMAN, J. I am of opinion that this rule should be discharged. The action is brought for the breach of a promise to marry. It appeared that in March, 1877, the parties had come together and the defendant offered the plaintiff marriage, and that she said she would accept him on condition that his parents approved of the engagement: and it further appeared that on the 6th of April an engaged ring was given by the defendant to the plaintiff. There was therefore good evidence of an engagement and promise by the defendant to marry the plaintiff, and of her acceptance of his offer subject to the condition imposed by the plaintiff. At this time the defendant was not of age. On the 18th of April, he being then in Shropshire on a visit to his parents, he sent a letter to the plaintiff telling her that he had informed his father and mother of his engagement, and had obtained their consent; and on the 20th (on which day he attained his majority) he had an interview with the plaintiff, in the course of which he said to her, "Now I may and will marry you as soon as I can." Four questions were left by my Brother Lopes to the jury. The first was whether any promise of marriage was made by the defendant to the plaintiff before the 20th of April, 1877; and, if so, was it absolute or conditional. That question is not complained of. The second question was whether there was a new absolute promise then or afterwards, or whether what then occurred was merely a ratification of a promise made during infancy. The jury found that a new absolute promise was made on the 20th of April; and upon the other questions they found that the promise was broken, and that there was no release. It was contended for the defendant that *Coxhead* v. *Mullis* (4) shewed that, in such a case as this, where there has been an original engagement during minority, any such language as this, if capable of being construed as a ratification, must be so construed, and that, by virtue of the Infants Relief Act, 1874, no action can be brought upon a mere ratification when of full age of a contract made during

(1) 8 C. & P. 75.

(2) 6 C. B. 295; 6 D. & L. 120.

(3) Law Rep. 10 Q. B. 564.

(4) 3 C. P. D. 439.

infancy. The only question, therefore, which we have to determine is, whether it was a misdirection to leave the second question to the jury as it was left. *Coxhead* v. *Mullis* (1) is relied on to shew that it was. Now, it appears to me that that case is clearly distinguishable. It was there held, upon the facts proved, that, though the conduct of the defendant after he became of full age amounted to a ratification of the promise made by him during his minority, the nonsuit was right; for, assuming that there was a ratification, the plaintiff's right of action was taken away by the statute, and there was no evidence of a fresh promise made after the defendant came of age. Lord Coleridge, C.J., says (2): "The action is brought against a person of full age, for the breach of a contract of marriage which he undoubtedly had made when an infant. There had been various disputes between the parties, and finally the engagement was broken off after the defendant had become of full age. It was admitted that there had been no fresh contract or promise after the defendant came of age; or, at all events, there was no evidence of any such fresh promise. There had been a clear promise before, and there was abundant evidence of ratification, if ratification alone would do, after the defendant attained his majority. Before saying a word upon the question whether the Act applies, I may observe that I am of opinion that, where there is a clear promise such as was proved in this case,—a promise to marry being in this respect like any other contract,—ratification, if it exists, must have reference to the contract proved; and you cannot say, because there is a ratification from day to day, that there is a fresh promise from day to day. Evidence of ratification is one thing, evidence of a fresh promise is another; and, if there is positive proof that the promise was made before and the ratification after the defendant became of full age, supposing that the Act applies to such a case, I am of opinion that the ratification would not be evidence of a fresh promise, but must be referred to the promise made before the defendant was of age." The decision in that case was that the statute applies to contracts of marriage; and we are bound by it; but it turns upon the clear admission that there had been no fresh promise after the defendant came of age. Here there was ample evidence of a fresh promise; and we are not bound to hold that, in every case in which it can be construed as a ratification, the new promise must be taken to be evidence of ratification. Now, what are the words of s. 2? [His Lordship read them.] I do not say that the words are as strong as might have been used; and a jury may be warranted in saying that the language relied on amounts only to a ratification of a previous promise. It is not matter of law. It appears to me that, in all cases where the language is such as was used here, it is for the jury to say whether the defendant meant to make a fresh engagement to marry the plaintiff, or merely to ratify a former promise. I think my Brother Lopes could not have withdrawn the matter from the jury without taking upon himself to decide a question of fact. Though in this action *conduct* may make out a promise of marriage, it is reasonable to hold it to be a mere ratification; yet if, after coming of age, direct *words* of promise are used, it is more reasonable to refer them to a fresh promise to marry rather than to a ratification of a former promise. It is enough, however, to say, that here it was a question for the jury. I lay no stress upon the question whether the original promise was founded on a different or the same consideration as the subsequent promise. It is safer not to do so; the words of the Act are so strong that if the question turned upon a fresh consideration I should hesitate to say that Mr. Kisch has made out his case. But the real point here is whether the question, whether the defendant's language amounted to a mere ratification only or to a fresh promise, was for the jury. I think it was, and consequently that the verdict must stand.

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(1) 3 C. P. D. 439.

(2) 3 C. P. D., at p. 441.

LOPES, J. I am of the same opinion. The plaintiff's evidence was that on the 9th of March she agreed to accept the defendant's offer of marriage provided his parents approved of it; and that on the 6th of April he gave her an engaged ring. Nothing material appeared until the 18th of April, when the defendant wrote to the plaintiff telling her that he had mentioned their engagement to his parents, and they gave their consent. On the 19th the defendant became of age, and on the 20th he had an interview with the plaintiff, in the course of which he said, "Now I may and will marry you as soon as I can," to which she assented. It is said that I should have told the jury that what took place upon that occasion was a mere ratification of the promise of the 9th of March, and could not amount to anything else. It appears to me that it was a question of intention,—did he intend to make a new absolute promise, or merely to re-affirm the old promise? I thought that this being a question of intention it could not be for me, but was one which I ought to leave to the jury; and I think so still. The case of *Coxhead* v. *Mullis* (1) is distinguishable on the ground stated by my Brother Denman. I was a party to that decision. There was no evidence in that case of any contract or promise made after the defendant came of age; all that was proved was that the parties conducted themselves in the same way as before.

Order dismissed, with costs.

Solicitors for plaintiff: *Kisch, Son, & Hanbury.*
Solicitor for defendant: *James Goren.*

(1) 3 C. P. D. 439.

1879
Aug. 2.

SMITH *v.* WILSON.

Practice—Specially indorsed Writ—Order III, rule 6—Order XIV, rule 1.

A writ of summons was indorsed as follows,—"The plaintiff's claim is 49*l.* 5*s.* 8*d.* The following are the particulars." It then went on "To goods," with dates and amounts, and, after giving credit for certain payments, it stated the balance due to be 49*l.* 5*s.* 8*d.* :—

Held, a sufficient indorsement under Order III, rule 6, to entitle the plaintiff to sign judgment under Order XIV, rule 1; and that the indorsement was not vitiated by the insertion therein of a banker's draft, which had been given as payment but was dishonoured, and in respect of which no claim was made.

[illegible] affd 5 CPD. 25 CA.

THE writ of summons in this case was indorsed,—

"The plaintiff's claim is 49*l.* 5*s.* 8*d.*: the following are the particulars:—

1879. Feb. 14.	To Goods				0	16	1
15.	Do.				4	13	6
March 7.	Do.				2	10	0
13.	Do.				7	3	0
24.	Do.				0	6	7
„	Do.				38	0	0
28.	Do.				19	10	0
May 9.	Do.				6	0	0
21.	British Commercial Bank draft returned				20	0	0
	Notary charges on same . .				0	1	6
"Cr.					99	0	8
March 8.	By British Commercial Bank draft	9	15	0			
April 23.	By cash	10	0	0			
29.	By British Commercial Bank draft	20	0	0			
May 23.	By cash	10	0	0	49	15	0
					£49	5	8

"And 2*l.* 15*s.* for costs."

A master having made an order allowing the plaintiff to sign judgment under Order XIV, rule 1, and that order having been confirmed by Field, J., on appeal,

Orr, moved to set aside the order, on the ground that the writ was not a specially indorsed writ within the meaning of rule 3 of Order VI. This indorsement does not comply with the directions contained in Appendix A., s. 7, and therefore does not disclose a cause of action so as to entitle the plaintiff to sign judgment under Order XIV, rule 1. It does not shew that the claim is for goods sold, or for goods illegally detained, or follow any of the examples given in the appendix, by describing their kind or quality. In *Walker* v. *Hicks* (1), Cockburn, C.J., says: "The object of the special indorsement is this: on the one hand, it is to have a very prompt and summary effect in favour of the plaintiff, by entitling him to apply to sign final judgment under Order XIV.: and on the other hand, it is intended that the defendant should have an opportunity of avoiding such further proceedings by payment of the debt. I think a party who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist." And Mellor, J., says, "It seems to me very important to prevent any loose dealing with regard to the form of special indorsements. A very summary remedy is given to the plaintiff where there has been such an indorsement. But, before the plaintiff can ask for final judgment, the defendant ought to have afforded to him, by the indorsement of reasonably specific particulars of claim on the writ, an opportunity of seeing whether the claim is one to which he has any defence or not."

[POLLOCK, B. If this indorsement had been headed "for goods sold and delivered," it must be conceded that it would have been sufficient. In the case cited the indorsement gave no information whatever: it was,—"The plaintiffs' claim is 399*l.* 9*s.* 7*d.*, the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiffs are jointly liable, and which bills and notes have been taken up by the plaintiffs."

(1) 3 Q. B. D. 8.

Denman, J. Could the defendant upon this indorsement entertain any doubt as to whether he ought to pay or to resist the claim?]

No information whatever is given as to the returned draft or as to the relation in which the defendant stands to it. In one case it was held by Lindley, J., that the indorsement was defective if it failed to disclose a good cause of action.

Walton, contrà. The indorsement is sufficient. "To goods" is universally understood to mean goods sold and delivered, as "By cash" is understood to be an acknowledgment of a payment. As to the banker's draft for 20*l.*, that appears on both sides of the account, and therefore may be treated as eliminated. In the absence of an affidavit that the defendant has been misled, there is no pretence for finding fault with this indorsement.

Orr, in reply. The defendant was not bound to make an affidavit: he is entitled to have a specially indorsed writ before he can have a judgment summarily signed against him.

Denman, J. I see no sufficient ground for overruling the decision of the master and the judge. The application is, to set aside a judgment signed under Order XIV, rule 1. That rule only applies to specially indorsed writs: and, if we are bound to hold this not to be a specially indorsed writ, we must set aside the judgment. Are we bound so to hold? To answer that it is necessary to look at Order III, rules 6 and 7, which provide that, where the claim is for a liquidated demand, the writ of summons may be specially indorsed with a statement of the amount sought to be recovered, according to the examples given in Appendix A. Now, it is impossible to doubt that this writ was intended to be specially indorsed in the manner there pointed out. The indorsement here no doubt varies somewhat from the first example there given. The words used there are, "The plaintiff's claim is for the price of goods sold. The following are the particulars:" it then goes on to describe the kind of goods, and to give credit for a cash payment. Here, the indorsement is, "The plaintiff's claim is 49*l.* 5*s.* 8*d.* The following are the particulars:" it then goes on "To goods," with dates and sums, and, after giving credit for certain payments, states the balance due to be 49*l.* 5*s.* 8*d.* It would not have been correct to head the indorsement, "The plaintiff's claim is 49*l.* 5*s.* 8*d.* for *goods sold and delivered*," as it is suggested it ought to have been, because after the items relating to goods there come two items for a returned draft 20*l.*, and notarial charges 1*s.* 6*d.* The form given in the Schedule, therefore, would not have been strictly applicable. The object of the rule is well stated in the case of *Walker* v. *Hicks* (1); and I think it has been sufficiently complied with here. This indorsement gives the defendant ample information to enable him "to satisfy his mind whether he ought to pay or resist." There is no suggestion that the defendant has been or could be prejudiced. With full knowledge of the nature and amount of the claim that is made against him, he has suffered judgment to go against him by default. Applying the test of common sense to this case, I think it would be manifestly unjust to set aside the judgment. The application must be dismissed with costs.

POLLOCK, B. I think with my Brother Denman that the master and the learned judge took the right view in this case. I agree with Mr. Orr that it would be illogical to require an affidavit of defence on the merits where there is no sufficient indorsement. The special indorsement is not a new thing. Such an indorsement was provided for in the Common Law Procedure Act, 1852, s. 25; and the forms are given in Appendix A. No. 4. The intention was, to put the indorsement in the place of particulars of demand; for, it was expressly provided that, "when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered unless ordered by the Court or a judge." Order III, rule 6, requires the indorsement to contain "the particulars of the amount sought to be recovered." What is sufficient must always be a question of degree. The true test is given by Cockburn, C.J., and Mellor, J., in *Walker* v. *Hicks*. (1) The sufficiency of the particulars to enable the defendant to satisfy his mind whether he ought to pay or resist must depend upon the course of dealing between the parties. One cannot shut one's eyes to what in one's common experience is the invariable way in which invoices are sent in. The nature, quality, and character of the goods supplied must, unless under very peculiar and special circumstances, be known to both parties. "Returned draft" is not to be confounded with a cause of action founded upon a dishonoured bill. I think the indorsement here was abundantly sufficient, and that this motion must be dismissed with costs.

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(1) 3 Q. B. D. 8.

Motion dismissed.

Solicitors for plaintiff: *Dunn & Palmer.*
Solicitor for defendant: *G. Johnson.*

May 13, 14, 23.

THE EMMA SILVER MINING COMPANY, LIMITED *v.* LEWIS & SON.

Company — "Promoters" — Metal Brokers of Mine — Fiduciary Relation — Secret Profits out of Sale to Company—Liability to refund.

The defendants, metal brokers, having previously sold ore of an American mine on a commission of 2½ per cent., arranged with a proprietor to assist in selling the mine to a company to be raised by him in England. He was to procure the appointment of the defendants as metal brokers of the company at the usual rate of English commission, viz. 1 per cent., and he promised that the defendants should be liberally remunerated to the extent at least of 5000*l.* for their assistance, and to compensate for the loss of the higher commission. They were, as he knew, acquainted with facts detrimental to the reputation of the mine, and he promised the liberal remuneration to ensure their silence respecting them.

The defendants assisted him in his endeavours to sell the mine to a company to be formed for the purchase of it, but left him to fix the price, get up the company, and manage all details respecting the sale. He procured the formation of the plaintiff company and the purchase by it of the mine for 100,000*l.*, half to be paid in cash and half in paid-up shares. The defendants were appointed metal brokers of the company at the 1 per cent. commission, allowed themselves to be named in the prospectus as being ready to answer any inquiries relating to the mine, and answered such inquiries, but kept silence with respect to the detrimental facts known to them. Payment having been made for the mine to the proprietor, 250 fully paid-up shares out of those received from the company were transferred by him to the defendants, and were subsequently sold, and the proceeds received by them. This transaction was not disclosed to the company.

In an action to recover the proceeds as secret profits made by promoters, the judge left the question of promotership, without any definition, to the jury, who found that the defendants were promoters, and gave a verdict for the plaintiff :—

Held, that there was ample evidence for the jury, and that the learned judge was not bound to give them a definition of the term "promoter;" that it has no very definite meaning, but involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it; and that the defendants were in a fiduciary relation to the company, and therefore liable to refund the secret profits, even although the contract of sale was not rescinded.

ACTION for conspiracy, and to recover secret profits made by the defendants as promoters of the plaintiff company on the sale of a mine.

The action was tried at Westminster before Denman, J., and a jury. It appeared at the trial that the Emma Silver Mine in America was in 1871 in the possession of Trevor William Park and others, who wished to sell it. Prior to July, 1871, the defendants, metal brokers at Liverpool, had been selling about one-half of the produce of the mine for the usual commission on sales for American companies, viz. 2½ per cent.

On the 17th of July the defendant Arthur Lewis, being then in America, began a correspondence with his father, the defendant James Lewis, by a letter written from the neighbourhood of the mine, stating that he, Arthur, contemplated giving assistance to mine owners in selling their mines to companies for a consideration of some kind, whether in money payments or by obtaining the sale of the ore, or allotments of shares or otherwise. A number of confidential letters passed between the father and son. From this correspondence it appeared that Arthur Lewis visited the Emma Mine and ascertained that it was of doubtful character; that a Professor Silliman who had given a favourable opinion of it was in popular estimation not trustworthy; that he, Arthur Lewis, was asked by Park to report upon it and to help him to place it on the English market, and would be willing to compensate the defendants liberally for their assistance. The defendants entertained the proposals. Park went to London, where the defendant James Lewis introduced him to a Mr. Taylor and another person likely to be instrumental in forming a company to purchase the mine, and was promised handsome remuneration, viz., 5000*l.* at the least, and if Park sold the mine at his own price 10,000*l*. The persons introduced by James Lewis did not, however, become the purchasers. On the 8th of November, 1871, the plaintiff company was registered. The memorandum of association stated the first of the objects for which the company was established to be "the carrying out of an agreement dated the 4th of November, 1871, between Trevor William Park of the one part and George Henry Dean of the other part." The capital of the company was 1,000,000*l*. in 50,000 shares of 20*l*. each. By the agreement of the 4th of November, Dean, as trustee for the intended company, agreed, on behalf of the company, to purchase the mine, &c., for 1,000,000*l*., of which 500,000*l*. were to be paid in cash and the residue in shares of the company. This agreement was mentioned in the articles of association as being adopted by the company. On the 9th of November the prospectus of the company was issued. It stated that the defendants would be ready to answer any inquiries relating to the ores and also as regarded the mine, one of their firm having been at the mine for some time. The defendants swore that they gave no express authority for this use of their names, but on the 11th of November James Lewis wrote to Arthur Lewis in America, sending a paper with the prospectus, and saying that he was writing to Park to let him have half the amount he promised him in paid-up shares. Between the 11th and 23rd of November several letters passed between James Lewis and persons who had received the prospectus, referring to the paragraph stating that one of the firm had been at the mine for some time, and that they would be ready to answer inquiries as to the mine, and inquiring whether Lewis & Son believed all that was stated in the prospectus. The answers to these letters varied in language to some extent, but they were all to the effect that the figures given in the prospectus as to the quality of the ore sold by the firm and the amount realized were perfectly correct, but that they could guarantee nothing further, and that the persons inquiring must act upon their own judgment as to whether they applied for shares. They also inclosed a copy of the prospectus and a copy of a report by Professor Silliman as to the mine, and stated that "the future of the mine entirely depended on the full realization of the report" as to whether it was a true fissure vein or merely a deposit. "He speaks," wrote James Lewis in one of the letters, "very decidedly on this point, and is considered a great authority in the States." On the 23rd of November a minute was entered in the company's books stating that it was arranged that the present consignees, viz., another firm of metal brokers and the defendants, be continued for the present, reducing the commission to 1 per cent.

The defendants in the course of their evidence said that the remuneration to be received by their firm for their assistance was in consideration of the loss they would be put to by only receiving 1 per cent. commission instead of 2½ per cent. on the sale of the ore.

The purchase-money was paid, and 500,000*l.* value in shares allotted to the vendors, including 250 which were afterwards transferred from Park to Arthur Lewis. These 250 were sold for the defendants pursuant to a previous arrangement under which the defendants received 5968*l.* 15*s.* of the proceeds. This sum and dividends upon 250 shares and interest the plaintiffs claimed to recover, as money received by the defendants as trustees for the company, and under circumstances rendering the defendants liable to refund.

The learned Judge in summing-up the case to the jury explained to them the nature of the claim, and said that it was not only based on conspiracy and fraud but was also put thus: viz. that the defendants were promoters of a company, and that being promoters of a company they so conducted themselves as to make them liable to refund their ill-gotten gains. Then, after fully stating the evidence, his Lordship again put before the jury the contention by the plaintiffs in the following terms, viz., it is said "that the defendants were promoters of the company; that they so acted in assisting Park and assisting Stewart, and in going to Taylor and other matters; that even though the company might at the last moment have come into existence only by reason of some great financier coming forward and finding the money for the company, still they were in the common sense way of using the word promoters. Now I cannot lay that down to you, nor have I really at present any confident opinion whether that is or is not a true view of the law as to promoters, and whether by law they were promoters or whether they were not. I do not intend to give you any ruling about it, but I intend to assume it at present to be a question upon which there is some evidence to go to a jury, not meaning by that to say that there is evidence on which a jury ought or ought not to find it, but to ask you the question, as I intend to do. I think I need not elaborate more nor explain more to you." Finally, the learned Judge left a number of questions to the jury, who were unable to agree upon those relating to the conspiracy and fraud, but as to the question, "Were the defendants promoters of the company?" found that they were, and gave a verdict for the plaintiffs for the amount claimed.

The case was adjourned and heard on further consideration, when both sides claimed judgment, the defendants on the ground that there was no evidence which ought to have been left to the jury. After argument Denman, J., delivered a written judgment, setting forth the facts of which an outline has been given above, and holding that that was evidence upon which the jury might reasonably find that the defendants were promoters, and, at all events, that they were liable to refund the profits received by them in the shape of shares for which the company had received no consideration. His Lordship therefore gave judgment for the plaintiffs, for the sum awarded by the jury in respect of that part of the claim which consisted of a claim "for profits received by the defendants for the use of and as trustees for the plaintiffs."

A rule nisi having been granted on the grounds, First, That the judge misdirected the jury in telling them there was evidence of the defendants being promoters of the plaintiffs' company, or of their liability as such promoters, there being no such evidence. Secondly, That the judge further misdirected the jury in telling them that there was evidence of the shares received by the defendants being the shares of the company, and being received by the defendants under such circumstances as to render the defendants liable to the plaintiffs for the amount received by them for such shares, there being no such evidence. Thirdly, That the judge omitted to direct the jury as to what should guide them in finding the defendants to be promoters, or in finding that the defendants were liable to repay the amount received by them. Fourthly, That the verdict found by the jury for the plaintiffs was against the weight of evidence given at the trial.

Sir John Holker, A.G., Gorst, Q.C., and *C. E. Bowen*, shewed cause. The direction by the learned Judge was proper and sufficient, and the findings of the jury were right on the facts. First, if the defendants were promoters of the plaintiff company, and, under a bargain with Park, got a profit out of moneys of the company without disclosing the transaction, they became liable to pay over to the plaintiffs all the money received. This doctrine is now fully recognised at Common Law, but, were it not so, the rules of Equity would prevail, and recent cases in Chancery establish it: *Bagnall* v. *Carlton.* (1) The question there was, as here, simply whether the promoters should refund, not whether the contract should be rescinded, and, as Denman, J., said in his judgment, that case "clearly establishes that persons who know that the sum they are to receive is to come out of the secret profit which persons standing in the position of trustees for the company are going to put into their own pockets, are themselves in a fiduciary relation to the company, and answerable as trustees to refund any profits so made by themselves at the expense of the company.

Secondly, the defendants were, in fact, promoters. Promotership is a question of fact, not of law, and was so treated by Jessel, M.R., in *Emma Silver Mining Company* v. *Grant.* (2) If one takes part in getting up a company or enters into an arrangement that it shall be got up, he and each of the parties to the arrangement will be responsible for the acts of the others done in consequence of it to get up the company.

The correspondence here shews that there was such an arrangement. "The words promoter, director, or trustee, include persons engaged in forming the company, or engaged in inducing the public to take shares in it when formed:" 1 Lindley on Partnership, 4th ed. p. 116. It is neither possible to define nor prudent to attempt to define "promoter," and no definition is settled by authority. But the nature of promotership is clearly demonstrated in *Twycross* v. *Grant* (1) and other cases. There is nothing to limit it to the time before the actual registration of the company; nor to obtaining an Act of Parliament: *In re Barry Railway Company.* (2) The question of privity of contract between the promoters does not arise. And "it is not necessary in order to make one man liable for the tortious acts of another that the relation of principal and agent should subsist between them:" per Willes, J., in *Upton* v. *Greenlees.* (3)

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(1) 6 Ch. D. 371.

(2) 11 Ch. D. 918.

Where persons take part in getting up a company, or enter into an arrangement that it shall be got up, they and all the parties to the arrangement are responsible for the acts of each other done to effect the common object.

The correspondence shews such an arrangement.

[They examined and commented on the evidence.]

The learned Judge did not misdirect in not telling the jury that there was no evidence of promotership. The evidence of it was abundant. The defendants agreed to assist Park, were in a position to do so materially, and exerted themselves both before and after the incorporation to promote the company and to get shareholders. Their mere silence as to the doubtful character of the mine, and of Silliman who reported in its favour, assisted the formation of the company, There was evidence of the 250 shares being part of the 500,000*l.* worth, for the correspondence between the defendants, their agreement with Park to let Grant hold the 250 shares, and the books of the company, all proved it. There was abundant evidence that the shares were received under such circumstances as rendered the defendants liable to the plaintiff. Jessel, M.R., has refused to define "promoter," anticipating that attempts would at once be made to escape from any legal definition of it. A jury would be embarrassed rather than assisted by a definition. The term is not one of art or law. Therefore Denman, J., was right in not defining it. It was also unnecessary to tell the jury that the defendants were liable in law to refund, for if the jury found them to be promoters the liability would follow.

Lastly, the verdict was not against the weight of evidence.

(1) 2 C. P. D. 469.

(2) 4 Ch. D. 315.

(3) 25 L. J. (C.P.) 44, at p. 54. 1 Jur. N.S. 1073

Sir Henry James, Q.C., Herschell, Q.C., and *R. Henn Collins,* in support of the rule. The evidence was quite insufficient to establish promotership, and the jury should have been told so. True the defendants may have assisted Park. But he was a vendor and not a promoter, in any sense which would deprive him of his right to keep every penny of the purchase-money paid for the mine. Moreover, to assist one who is forming a company is not necessarily to promote it. The defendants did no acts constituting them promoters. The introductions which they gave to Park were without result. They neither helped to create nor to procure the incorporation of this company. An attempt to form some company would not suffice, the promotion must be of this particular company. Silence as to the character of the mine cannot be treated as an act of promotion, for the vendor had no duty to reveal what he knew to its disadvantage, nor had the defendants who were acting in his interest.

[LORD COLERIDGE, C.J.:—In *Fox* v. *Mackreth* (1) Lord Thurlow, C., puts this case, "Suppose A. knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a court of equity set aside this bargain? No."]

If the purchase-money cannot be recovered from the vendor, it cannot be recovered from a third person to whom he has paid part.

[LORD COLERIDGE, C.J.:—What if the vendor said to the third person, "I will charge an additional 500*l.* which you shall have?"]

The transaction would be unimpeachable.

[LINDLEY, J.:—But if he referred the vendee to a third person for information and the third person made false statements?]

Then a fiduciary relationship would be created by the undertaking to give information. The defendants, however, at most only expressed their opinion, just as brokers do, and were careful to warn inquirers to judge for themselves of the investment. The only act which can be for a moment looked upon as an act of promotion was the fact of the defendants allowing their names to appear in the prospectus. But that is not enough. If it were, every solicitor, or banker, or broker, to a company might be made liable as a promoter, because he was mentioned in the prospectus.

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(1) 2 Cox, 320; 1 White & T. L. C. 5th ed. p. 146.

A "promoter" may be, first, one who creates or takes some steps towards creating the company; secondly, one who does an act which assists to form a company; thirdly, one who aids in procuring shareholders after the formation. But non constat that any such promoter is in a fiduciary capacity towards the company. It is the fiduciary relation, and not mere promotion, which creates the trust, and the jury should have been so instructed. In *Erlanger* v. *New Sombrero Phosphate Co.* (1), Lord Cairns, L.C., after stating that the plaintiffs were promoters says, "it is now necessary that I should state in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation." No such power had the present defendants. In *Gover's Case* (2) the Court did not hold that the contract of purchase made with the owner of the patent, afterwards sold by the purchaser to a trustee for an intended company, shares in which were to be handed over to the owner in part payment, constituted the purchaser a promoter. In *Bagnall* v. *Carlton* (3) the two defendants, who even prepared the skeleton prospectus and introduced the vendor of the property to the promoters of the company created to work it, and received a commission, were dismissed from the action for the rescission of the contract of purchase. The passage cited from 1 Lindley on Partnership, 4th ed. p. 116, has reference to *Twycross* v. *Grant* (4), the decision of which however was only that, if the defendants were promoters before, they did not cease to be so at the moment when the company was constituted. But that case is no authority to shew that if the acts of promotion had stood alone they would have rendered the defendants liable. Cockburn, C.J., says, "The question as to when one who in the outset was a promoter of

(1) 3 App. Cas. 1218, at p. 1236.

(2) 1 Ch. D. 182.

(3) 6 Ch. D. 371.

(4) 2 C. P. D. 469.

a company continues or ceases to be so, becomes, as it seems to me, one of fact. A promoter, I apprehend, is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose." Lindley on Partnership (4th ed.) vol. i. pp. 584–5, points out that "there is often a difficulty in determining when a promoter of a projected company begins to be in such a position as to be unable to make a secret profit by a sale to it, or to persons acting on its behalf. On the one hand it is quite plain that a fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise. On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such a relation; something must, it is submitted, be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately form the company. . . . He does not assume such duty by negotiating with persons who have themselves assumed that duty and are in no way under his influence." Here the defendants had no governing voice, or controlling influence over the creation of the company. The learned judge was not bound to give an exhaustive definition of the term "promoter," but should have explained it to the jury. The money was not, as in *Bagnall* v. *Carlton* (1), money of the company earmarked and in the hands of the vendor. The shares were handed to the vendor of the mine under a contract of purchase which has never been rescinded. They became his property and were transferred by him to the defendants for good consideration. Therefore the proceeds cannot be followed by the company.

Cur. adv. vult.

May 23. LINDLEY, J., delivered the judgment of the Court (Lord Coleridge, C.J., Denman and Lindley, JJ.)

There was abundant evidence to shew, and indeed it was in our opinion clearly proved:

1. That the defendants knew that Park came over here to sell the mine to a company, to be got up by himself and such persons as he could induce to assist him.

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(1) 6 Ch. D. 371.

2. That the defendants were prepared to assist, and did assist, Park in his endeavours to sell the mine here to a company to be formed for the express purpose of purchasing it.

3. That the defendants had been metal brokers to the former owners of the mine at a commission of 2½ per cent., and that there was an understanding between the defendants and Park that he should, if he could, procure them to be appointed the metal brokers of the new company at the usual English commission of 1 per cent.

4. That there was first an understanding, and secondly a verbal promise, that the defendants should be liberally remunerated by Park for their services and for their loss of commission.

5. That this remuneration was in some shape or other to come out of the purchase-money to be paid by the company.

6. That the defendants left Park to fix the price of the mine, to get up the company, and to manage all details with the company, and trusted him to protect their interests.

7. That Park, Grant, and others accordingly procured the plaintiff company to be formed, and procured it to buy the mine for 1,000,000*l.*, of which 500,000*l.* was to be paid in cash, and 500,000*l.* in paid-up shares of the company.

8. That the defendants became metal brokers to the new company on the terms of being paid the usual English commission of 1 per cent., and allowed themselves to be referred to in the prospectus of the plaintiff company for information concerning the mine; and, so far as such reference might induce people to take shares, the defendants themselves indirectly assisted in procuring shares to be taken.

9. That the defendants knew more of the mine and of its doubtful value, and of the grounds for distrusting Silliman's report in its favour, than they chose to disclose; and Park was aware of this, and promised the defendants liberal remuneration to insure silence on their part, even when referred to for information.

10. That the defendants, when referred to, were studiously careful to preserve that silence which was essential, or, at least, conducive to floating the company.

11. That pursuant to the above understanding and verbal promise, Park gave the defendants 250 fully paid-up shares of the

company out of the shares given to him by the company for the mine; and Park entered into an agreement with the defendants respecting the disposal of the shares, so as not to injure the sale of other shares held by himself and others who had assisted him in forming the company.

12. That all these facts (except the appointment of the defendants to be metal brokers at the usual commission of 1 per cent. and the reference to the defendants for information) were studiously concealed from the plaintiff company.

Under these circumstances the jury found the defendants to be promoters of the company, and to be liable to restore to the company the value of the 250 shares obtained by them.

It is said that there was no evidence to go to the jury of the defendants being promoters of the company, in the proper sense of that expression; that there was no sufficient explanation of the proper meaning of the word given to the jury; and that the defendants were entitled to judgment, or, at all events, to have a new trial.

With respect to the word "promoters," we are of opinion that it has no very definite meaning: see *Twycross* v. *Grant.* (1) As used in connection with companies the term "promoter" involves the idea of exertion for the purpose of getting up and starting a company (of what is called "floating" it) and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it. It is now clearly settled that persons who get up and form a company have duties towards it before it comes into existence: see *Bagnall* v. *Carlton* (2) and per Lord Cairns, C., in *Erlanger* v. *New Sombrero Phosphate Co.* (3)

Moreover, it is in our opinion an entire mistake to suppose that after a company is registered its directors are the only persons who are in such a position towards it as to be under fiduciary relations to it. A person not a director may be a promoter of a company which is already incorporated, but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators.

(1) 2 C. P. D. 469.

(2) 6 Ch. D. 371.

(3) 3 App. Cas. 1218, at p. 1236.

The defendants say they owed no duty to this company. But in our opinion this contention cannot be supported. In the first place, the defendants left Park to get up the company upon the understanding that they as well as he were to profit by the operation; they were behind him; they were in the position of undisclosed joint adventurers; and in respect of their interest his obligations and theirs are in our opinion undistinguishable. The defendants in fact were, partly by assisting Park and partly by leaving him to do the best he could for them as well as himself, in the position of promoters of the company.

In the next place, the defendants became the metal brokers of the company; and it became their duty not to take from the company for their appointment or services a greater remuneration than the company knew they were getting. The company agreed to pay the usual commission of 1 per cent., and had no idea that the defendants were getting 5000*l.* in addition to a bonus. Whether this bonus was for services to Park in assisting him in getting up the company or for loss of commission, or partly for one and partly for the other, seems to us immaterial. In any view, the defendants, being agents of the mine, obtained a large profit from the company through the instrumentality of Park. This profit was concealed from the company, and cannot be retained by the defendants.

Again, the acceptance by the defendants of the reference to them in the company's prospectus, imposed upon the defendants a duty to the company to answer candidly such inquiries as might be made by intending applicants for shares. The defendants by this acceptance undertook the duty of assisting to float the company, by answering the inquiries of persons proposing to take shares in it; and they did in fact answer inquiries in such a way as to allay suspicion.

Upon these grounds we are of opinion that there was ample evidence to warrant the finding and verdict of the jury; and in our opinion an elaborate explanation of the meaning of the word "promoter" would not have been of any advantage to the defendants, nor calculated to give any real assistance to the jury in drawing proper conclusions from the facts.

It has, however, been urged that the company have not rescinded their contract with Park; and that so long as that contract remains unrescinded the shares given by him to the defendants must be treated as having been his to give, and that the company cannot claim them. But the moment it is proved, as in this case it is, that the 1,000,000*l.* paid by the company, although nominally paid for the mine, was only colourably so; that some portion of that sum, say 5000*l.*, was not for the mine at all, as the company supposed, but was for something very different, e.g., the remuneration of the Messrs. Lewis, and that the company was, without knowing it, really paying them for, inter alia, their acceptance of the office of metal brokers, and for concealing their own misgivings as to the mine, and when it is further proved, as it is, that the shares paid to the defendants were created for the purpose of paying them, and the company was never informed of this, it follows in our opinion that the company can recover from the defendants what they have thus obtained, without rescinding its contract with Park.

We are aware that in most, if not all, cases of this description which are to be found in the books, there has been evidence to shew how much of the price paid by the company was paid to the real vendor for the property he sold, and how much of this so-called purchase-money went into the pockets of the promoters; and we see the difficulty, and indeed the impossibility, of saying in this case how much of the 1,000,000*l.* was paid for the mine itself. Further we assume that Park, as vendor, might have asked any price he pleased for the mine, and that the company would have had no right to recover from him or any one else the price the company paid, or any part of it, simply because the company had made a bad bargain, or because Park had made a large profit by the transaction. We do not in any way rely on the report of the committee of investigation, alleging that nearly 200,000*l.* was paid for promotion-money, nor do we attach much importance to the defendant's uncandid answers to the charge made against him in the *Hour* newspaper. But we do consider it proved beyond all doubt that some part of the 1,000,000*l.*, viz., so much as was paid to the defendants, was not the price of the mine, but the price of something very different; and that the defendants knew this perfectly well when they obtained the 250 paid-up shares in question in this action. For the reasons we have given we think that the verdict was right; that judgment ought not to be entered for the defendants; that there ought to be no new trial, and that the rule ought to be discharged with costs.

Rule discharged with costs.

Solicitors for plaintiffs: *F. W. Snell & Greenip.*
Solicitors for defendants: *Burton, Yeates, & Hart.*

March 18.

THE SHEFFIELD WATERWORKS COMPANY, Appellants; WILKINSON, Respondent.

SAME, Appellants; CORBIDGE, Respondent.

Waterworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 17)—*Right to cut off Supply of Water for Non-payment of Rates—Procedure for obtaining Restoration of Supply.*

QBD 641]

A tenant of premises supplied by a company with water having failed to pay the water-rate, the company under the powers conferred upon them by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under s. 43 of the Waterworks Clauses Act for such refusal:—

Held, that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by s. 43 until he himself had restored the communication with their main pipes.

Case stated by a police magistrate under 20 & 21 Vict. c. 43.

1. By an information laid on the 26th of November, 1878, Walter Wilkinson complained that, on the 9th of November, 1878, he being the owner of a dwelling-house No. 12, Kaye Place, Barber Road, Sheffield, and then having laid communication pipes and done the necessary works, and tendered the water-rate payable in respect thereof, as required by law, did demand from the water company a sufficient supply of water for domestic purposes for the said dwelling-house, and that the water company

had neglected and refused to give such supply, contrary to the statute. The company were thereupon summoned.

2. On the hearing it appeared that the annual value of the house did not exceed 10*l.*; that it was one of a group of houses; that by about October, 1877, the communication pipes for bringing the water from the company's main into the house were laid down to it with the rest of the group, under an arrangement nearly answering to a full carrying out of the provisions of ss. 44 and 47 of the Waterworks Clauses Act, 1847; and that, so long as the water-rates payable therefor should be duly paid, the occupier of the house was in the language of s. 44 entitled to have a sufficient supply of water for his domestic purposes.

3. At Lady Day, 1878, David Kaye was owner of the house in question, and as such was the owner liable in respect of it to the provisions of s. 72 of the Waterworks Clauses Act, 1847. The water-rate for the then past quarter, which ended on the 25th of March, was paid in accordance with an accustomed practice of the company.

4. When Midsummer, 1878, came, no payment of water-rate was made either for the then past quarter, or for the quarter then commencing, or for any other period.

5. On the 6th of August, 1878, Kaye filed a petition for liquidation in the county court, and one Pearson was appointed receiver under the Bankruptcy Act, 1869. It then appeared that the house in question (with eight others) had been mortgaged by Kaye to the Alliance Benefit Building Society by deed dated the 21st of June, 1878, under which the mortgagor was to remain in occupation of one of the other houses and a tenant of his in occupation of No. 12; but the mortgagees had power to enter and sell in the event of proceedings in liquidation taking place. The result was that the mortgagees intervened on or immediately after the 6th of August, made Pearson their agent, and gave the tenants notice to pay their rents to him. Meanwhile, the water-rate for the past quarter remained unpaid, and a portion of the then current quarter had run out, viz. from the 24th of June to the 6th of August. On the 7th of August, an officer of the company gave Kaye notice that, unless the water-rate was paid on or before the 9th, the supply would be cut off. On the 14th of

August, the respondent's solicitors wrote to the company warning them that they would be held responsible for any loss or damage which the mortgagees or the tenants might sustain if the water were cut off.

On the same day the company stopped the water from flowing into the house, by cutting the communication-pipe, and wrote to the solicitors, as follows:—"The water-rate in respect of Kaye's property is unpaid; and, as the company have under such circumstances a clear right to cut off the supply of water, I am at a loss to understand the meaning of the threats in your letter. If the water-rate for the quarter ending June 30th and a proportion of the current quarter up to the 6th of August, the date of Kaye's liquidation, which together amount to *3l.* *8s.* *4d.*, is paid at once, the water can be supplied again to the property on the usual order being given by the owners of it, whether they be mortgagees or the trustees in the liquidation. The cost of the junction will of course have to be paid by those who order it." To this the appellant's solicitors replied,—"The water-rent is not a charge against the property, and the mortgagees are no more liable to pay Kaye's debt than a purchaser would have been liable. We should be obliged by your informing us under what Act of Parliament you claim the right to make mortgagees pay their mortgagor's debts. We repeat that the mortgagees are ready to pay in advance, if you require it, the rent from the time they took possession." And on the same day the solicitors wrote again,—"Since writing our letter this morning, we are informed that the water has been cut off. We must require you to again connect it; and we shall pay whatever the costs may be, under protest." To this the secretary answered on the 16th,—"I did not say the water-rate was a charge upon the property, or that the mortgagees were liable to pay Kaye's debt. All I did say was, that the company has a clear right to cut off the water from property in respect of which the rate is payable, if it is not paid when due. This is so: but the company does not assert any right against the mortgagees: they and the other parties entitled must settle amongst themselves who is bound to make the payment. Until it is paid the company is entitled to stop the water from flowing into the premises; and in this case the right will be exercised."

6. On the 29th of September, 1878, a fresh quarter began, viz. from thence to the 25th of December. At Michaelmas no water-rate was paid or tendered by any one. On the 6th of November the mortgagees sold the house (with other property) to Wilkinson, the respondent, and on the 9th the latter wrote to the company requesting them to re-connect the pipes. This the company refused to do till their claims were paid.

On the 12th of November, the solicitors again wrote to the company,—"If you require payment in advance, Mr. Wilkinson is prepared to pay for the cost of making the necessary connection, and also pay a quarter's water-rent in advance in respect of the houses. Please inform us whether you require a formal tender to be made, in case you still refuse to give the supply, as we are instructed to take proceedings." To this the company's manager replied,—"Until the company's claims have been met, I cannot give orders that the water shall flow into the premises. I shall not require you to make the formal tender named in your letter of the 12th instant."

7. The water company from the 14th of August up to the time of the laying of the information on the 26th of November never laid the water on to the house again; and no one paid any water-rate for the quarter from Lady Day to Midsummer Day, or for any subsequent time.

8. Upon the hearing it was contended by the counsel for the appellants that, upon the above facts, Mr. Wilkinson was not entitled to have the water put on again, without paying the water company their claims for arrears of rates. It was contended by the advocate for the respondent that he was not bound to pay the arrears of rates, and that the complaint was properly made under s. 43 of the Act.

9. The opinion of the magistrate was to the following effect:—On looking into the Waterworks Clauses Act, 1847, I came to the conclusion that many provisions in it turn upon an intention that the water-rate shall either be paid in advance at the beginning of each quarter or be enforced and collected while it is current: and I thought that the provision of s. 74 as to stopping the water from flowing into the premises essentially rests upon this intention being borne in mind. This intention, I thought, is displayed by

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the latter part of s. 70 as to first payments of the water-rates, by the first part of s. 70 as to subsequent full quarters, and by the provisions of s. 71 as to cases in which notice is given between two quarter days of intention to discontinue the use of the water, and cases in which a removal takes place between two quarter-days. It seemed to me that, however advisable the accustomed practice of the Sheffield Waterworks Company may be for their own case, it cannot alter the intention and meaning of the Waterworks Clauses Act, 1847, which was passed independently and several years before its provisions were adopted by the company in 1853. In connection with this intention that there should if possible be payment of the water-rate either in advance or during a current quarter, it seemed to me that there is an intention that the liability for each quarter's water-rate shall be a simply personal liability,—each quarter's rate attaching either to the occupier who is actually supplied with the water for which the rate is charged, or to the owner who is in his shoes at the time, and the slight exceptions, as to paying for a full quarter when a discontinuance or removal takes place, did not seem to me to interfere with this intention. The language of the first half of s. 68, with the general bearing of the Act, appeared to me to intend that the liability shall be a simply personal one in cases within s. 68: and the language of s. 72, which makes the present case (house not exceeding 10*l.* annual value) an exception to s. 68, seemed to me to intend that, if the liability is a simply personal one in cases within s. 68, it is to be equally so in cases wishin s. 72. I therefore thought that a water-rate accrued due does not attach to the house, so as to be a liability running with the land, nor at all attaches to assigns of it, whether they take through a mortgage or an outright transfer. As to s. 74 of the Act, the recovering the amount of the rate from the person supplied with water seemed to me the principal remedy given to the company; and I thought the provision as to stopping the water from flowing into the premises was a further and lesser remedy added to the other. I thought that the two intentions above named must be attended to in dealing with both of these remedies of s. 74, and especially in dealing with the one as to cutting off the water. I thought that this latter remedy at least

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is intended for use only against the actual defaulter; and that assigns of a house, whether taking title through a mortgage or a purchase, cannot have it enforced against them for the defaults of their assigns as to rates before their time. I was, indeed, inclined to go further and think it is intended for use against any one only while the quarter to which the rate belongs is still current; so that, if a person is in default for the rate of a quarter which is past, I was inclined to think that he may nevertheless insist on paying for and having a supply for the current quarter, in spite of his default, and though the company may proceed against him according to the principal remedy for the arrear, they would be wrong if they stopped the supply of water for it,—much less, therefore, as it seemed to me, can the supply be stopped for arrears of past quarters as against any other person than the actual defaulter, whether taking title through him or not.

Applying this reading of the Waterworks Clauses Act, 1847, to the information laid by Mr. Wilkinson, I arrived at the following results:—This cause of complaint is laid as beginning on the 9th of November, that is, after the quarter from Michaelmas Day to Christmas Day had begun to run. At that time no water-rate for the quarter from Lady Day to Midsummer Day had been tendered or paid by any one; no water-rate for the quarter from Midsummer Day to Michaelmas Day had been paid by any one; and no water-rate for the then current quarter had been paid by any one. If this were all that had taken place, it seemed to me that, as soon as Mr. Wilkinson on November the 12th made the tender of the whole of the rate for the current quarter from Michaelmas Day to Christmas Day, he became entitled to be supplied with water for the rest of the current quarter, without paying the rates for either of the past quarters; and that, on the company neglecting or refusing to furnish him with the supply of water, his cause of complaint against them came within s. 43.

But, more than this had taken place; for, while the past quarter was current, the water company (assuming to act under s. 74) had stopped the water from flowing into the premises, so that the water was in a state of stoppage when Mr. Wilkinson came on the scene. This being so, I thought it was open to doubt whether at least the more proper course would not have been for him to have proceeded as if no pipes, &c., had ever been laid down, that is, under ss. 44 and 45 of the Act: but, on the whole, I thought that, as he had offered to pay the cost of re-connecting the communication-pipe which the company had cut off from the main, he was not wrong in complaining under s. 43.

10. Upon the above grounds the magistrate came to the decision that the waterworks company had incurred a penalty of 10*l.* under s. 43 of the Act, and had also forfeited under s. 43 the sum of 40*s.* to Mr. Wilkinson for each of the fourteen days between the 12th of November when the letter of that day was sent, and the 26th of November when the information was laid: and he accordingly ordered that the appellants should pay those sums (making together 38*l.*), and certain costs.

The question for the opinion of the Court was, whether or not the decision was right in point of law.

March 14. The appeals were argued by *Cave, Q.C.* (*Cyril Dodd*, with him), for the appellants, and by *Tennant* for the respondents.

The contention on the part of the appellants was, that, the supply of water having been properly cut off under the authority conferred upon the company by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), for non-payment of rates due from the then tenants, they were under no obligation to restore the connection, and the respondents were not entitled to be supplied with water until the arrears were paid and the pipes re-connected under the provisions for that purpose in ss. 44 and 48 respectively; and that it was no part of the duty of the company to restore the communication.

In Wilkinson's case the pipes had originally been laid by the company under s. 44, and the respondent was ready to pay the current quarter's rate (but not the arrears due from the former tenant of the premises) and the expense of re-connecting the communication-pipe,—a formal tender being dispensed with.

In Corbidge's case the pipes had originally been laid down by the owner of the premises under s. 48, and the respondent had tendered the current quarter's rate, but had not proceeded to cause the communication to be restored.

For the respondents it was contended, that, upon tender of the rates payable for the current quarter, the company were bound to restore the communication and to supply the water, and were liable to the penalties imposed by s. 43 for their refusal to do so.

The arguments are fully stated and the several sections of the Act referred to and commented upon in the judgment.

Cur. adv. vult.

March 18. BRAMWELL, L.J. I have come to the conclusion that this conviction cannot be sustained. The grounds upon which I arrive at that conclusion require a considerable amount of statement. The information is founded on the 43rd section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which says that, "if, except when prevented as aforesaid (1), the undertakers neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of 10*l.*, and shall also forfeit to every person having paid or tendered the rate the sum of 40*s.* for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply." The question is, whether the informant Wilkinson is a person who was entitled under the Acts to receive a supply of water. In one sense the company have refused to furnish the supply, that is to say, they have not supplied the water. Whether that is a *refusal* under the statute may be to my mind a matter of some doubt, because, as matters stood when they were called upon to supply it, they could not supply it, by reason of the service pipe having been severed. I will, however, treat it as a refusal, and deal with the question as being this,—was the respondent a person entitled under the Act to receive a supply of water? Now, Mr. Cave made a very obvious remark, no doubt, but it is one which it will be as well to bear in mind, because it is really the key to the whole matter: it was this, that, if the respondent is a person entitled, he must be entitled under the Act of Parliament, because

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(1) That is, "by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs," s. 42.

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no one can have a natural or inherent right to be supplied with water by this company. Now, the persons entitled to a supply are the persons described in ss. 44 and 48 respectively. I will begin with s. 44, which is introduced by these words, "And with respect to the communication-pipes to be laid *by the undertakers*," and which enacts that "the undertakers shall, upon the request of the owner of any dwelling-house in any street in which pipes shall have been laid down by them, the annual value of which house shall not exceed 10*l.*, or upon request of the occupier, with the consent in writing of the owner or reputed owner of any such house or of the agent of such owner, and upon payment or tender of the proportion of water-rate in respect of such house by this or the special Act made payable in advance [s. 70] lay down communication pipes and other necessary works for the supply of such house with water for domestic or other purposes, and shall keep the same in repair, and thereupon the occupier of such house shall be entitled to have a sufficient supply of water for his domestic purposes from the undertakers." The section goes on to provide that the undertakers may charge for such pipes and works, in addition to the water-rate, such reasonable annual rent as shall be agreed or shall be settled as therein mentioned, &c. The next class of persons entitled to a supply are those described in s. 48, which is introduced by these words, "And with respect to communication pipes to be laid *by the inhabitants*," and which enacts that "Any owner or occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act, who shall wish to have water from the waterworks of the undertakers brought into his premises, and who shall have paid or tendered to the undertakers the portion of water-rate in respect of such premises by this or the special Act directed to be paid in advance, may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground, and lay any leaden or other pipes from such premises to communicate with the pipes of the undertakers, &c.; provided always that every such owner or occupier shall, before he begins to lay any such pipe, give to the undertakers fourteen days' notice of his intention to do so." Then, after a variety of details as to the mode of making such communication, as to the bore of the service-pipes, and as to the notice to be given by the proprietor before the removal of the same, &c., s. 53 enacts that "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication-pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes." The respondents are persons within these sections: in Wilkinson's case, the communication-pipes were laid down by the undertakers, under s. 44; in Corbidge's case they were laid down by the owners, under s. 48: and in both cases the rates were duly tendered, or a tender was dispensed with. If the matter had stood there, the respondents would have been entitled to a supply of water, and the appellants would have been liable to the penalties for improperly withholding a supply. But then comes s. 74, which enacts that, "if any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water-rate, neglect to pay such water-rate at any of the said times of payment thereof,"—which was the case here, —"the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate *due from such person*, if less than 20*l.*, with the expenses of cutting off the water and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act; or, if the rate so due amount to 20*l.* or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any Court of competent jurisdiction." Well, the undertakers did cut off the water from the respondent's premises, and consequently the communication contemplated by the 44th and 48th and following sections became severed, and the company were unable to supply water to the premises in question until that communication should be restored. I find nothing in the Act of Parliament to compel the company to re-annex the service-pipes to their main,—a thing which would be attended with an expense which they are not under any obligation to incur: and that seems to me to dispose of the case.

Now, an argument which might be used, and which no doubt is a formidable one, is this,—if the opinion I am expressing is right, it follows that any occupier who omits to pay a quarter's rate, say of two or three shillings, may deprive his landlord of the right to a supply of water to his premises, because the company may avail themselves of their power under s. 74 to cut off the communication. If that be so, it is undoubtedly a hardship: but the answer which may be made to that argument, even if it were well founded, would be this,—It may be hard upon the owner of the house that he should be temporarily deprived of the supply of water through the default of his tenant; but it would be equally hard upon the undertakers, who have exercised a right conferred upon them by the statute, if they were bound at their own cost to restore the communication which they had rightfully severed. But, although it is not necessary to decide that, I really do not think that consequence follows, and for this reason:—Take the case of a house of above the value of 10*l.* per annum, where the service-pipe is laid down by the owner of the premises, if the communication has been severed, I see nothing in s. 48 to prevent his restoring it. Sect. 51 contemplates that the service-pipes may be removed by the persons who put them down and whose property they are. Suppose the house were burnt down, and not re-built for say ten years, the communication remaining all that time severed, what is there in s. 48 to prevent the owner's right to restore it at his own expense? So, where the service-pipe has been laid down by the undertakers, under s. 44, the owner of the house may, under s. 47, "pay off the amount then due to the undertakers in respect of the cost of providing and laying down such pipes and works, and all rent to that time due in respect thereof, and thereupon such pipes and works shall become the property of such owner, and all further rent in respect *thereof* shall cease to accrue to the undertakers." If the owner has availed himself of the right to purchase the pipes under that section, he is placed in the same situation as an owner under s. 48 and the following sections, and would be able to make the communication himself. I cannot help thinking that this idea derives some countenance from s. 46, which provides that, "if the occupier for the time being of the house in which any such communication-pipes or other works and engines shall have been laid down by the undertakers refuse to pay for a supply of water, or if such house be unoccupied for twelve months, the undertakers may demand from the owners thereof payment of the amount of the principal money invested by them in providing and laying down such communication-pipes and other works and engines; and, if such owner, after ten days' notice given to him by the undertakers, neglect or refuse to pay such principal money, the undertakers may enter the house and remove such pipes and other works; and the balance of such purchase-money, after deducting the value of such pipes and other works, with all arrear of rent for such pipes and works, shall, in default of payment, be recovered with the costs incurred from the owner or from the occupier for the time being, in the same manner as water-rates are directed by this or the special Act to be recovered." The result is this, that, where the pipes have been laid down by the undertakers, and the owner of the house has not availed himself of the option of purchasing them, the undertakers cannot at once proceed to cut off or remove the pipes, but must wait the prescribed time. Under these various sections, it seems to me that, where the communication has been severed, it is competent to the persons interested in the house to restore it by laying down fresh pipes or by re-connecting the existing pipe. I do not find anything in the Act of Parliament to authorize the breaking up of the soil for this purpose; but it seems to me to follow as a necessary consequence from the general provisions of the statute.

The conclusion I have come to is this,—that the undertakers may cut off the communication under circumstances such as are disclosed in this case, and that the appellants were not bound to restore the communication which they had lawfully interrupted under the powers of the Act. There is no hardship in this, because, as I have already intimated, there is a power in the owner to restore the communication himself by laying down fresh pipes or re-connecting the existing ones. My judgment does not proceed upon this, that the appellants have a right to insist upon the communication with their main remaining severed, until their claim for rates due from the preceding occupier is satisfied. I do not think they have such right. That was, no doubt, the notion upon which they acted: but in my opinion it is not sustainable. The learned magistrate who has stated this case has argued it extremely well; and I agree with him in thinking that it was not the intention of the legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from some one else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for by-gone rates. I do not, however, come to the conclusion I have done upon that ground: but I think there was no obligation on the appellants to supply water to the respondent's house until the communication was restored, and that they were not bound to restore it.

There is a slight distinction between the two cases. Wilkinson tendered to the company the expense of re-connecting the pipe,—at least he said he would be at the expense of restoring the communication, and the appellants' officer said, "You may consider that a tender, and we dispense with any formal tender." The appellants ought to have accepted that offer, because by doing so they would have got all that they were really entitled to or could enforce: but they were not bound to do it. There being no possibility of a supply of water being furnished whilst the communication was severed, I cannot say that the respondent was a person who was entitled to a supply or that the appellants were liable to penalties for withholding it. In Corbidge's case there was no tender of the expenses of restoring the communication, nor any dispensation.

It has taken me some time to express the opinion which I have formed, because the question involves a good many considerations, and is of some importance. It will be understood, I trust,—so far as my opinion is of any value,—that I do not hold that the undertakers have any lien for arrears of rates. If before they had cut off the supply, the amount of the current rate had been tendered to them, they would have had no right to cut it off, and would have been bound to supply the water notwithstanding there might have been anterior rates still due to them.

As to the costs,—If this proceeding had been adopted merely for the purpose of trying the question, and the respondents had been contented with a single penalty, the controversy would really have been so much for the benefit of both parties, that, seeing that the appellants were so substantially in the wrong in the sense I have mentioned, though right in point of law, I should have doubted whether the respondents ought to have been made to pay the costs of this appeal. But, as they have gone for substantial penalties,—38*l.* in the one case, and 30*l.* in the other, —I think the appeals should be allowed with costs.

Lopes, J. These two appeals raise questions of some importance and some difficulty under the Waterworks Clauses Act, 1847. The facts may be shortly stated thus:—Wilkinson was the owner of a house under the annual value of 10*l.* The house had belonged to one Kaye. Kaye mortgaged it; and in September, 1878, the mortgagees sold the premises to Wilkinson. At this time the water-rate for several quarters was in arrear; and on the 14th of August, 1878, the appellants, in exercise of the powers given to them under s. 74 of the Waterworks Clauses Act, 1847, cut off the supply of water to the premises, and the supply was so cut off when Wilkinson became the purchaser of the premises. On the 12th of November, Wilkinson tendered the then current quarter's rate, and offered to pay the expense of re-connecting the severed pipe. The appellants refused to furnish a supply of water until the arrears due from the former occupier were paid. Wilkinson summoned the appellants before a magistrate for this refusal, and they were convicted under s. 43 of the Act, and the penalties appearing in the conviction were inflicted upon them. In Corbidge's case the premises were of more than the annual value of 10*l.* One Biggs had occupied the house down to the 26th of September, 1878, when he filed his petition in bankruptcy. Corbidge was appointed receiver on the 27th, and lived in the house, and was accepted by the owner as his tenant. On the 23rd of October further rates were in arrear, and the company cut off the supply. On the 8th of November Corbidge tendered the current quarter's rate in advance; but the company refused to continue the supply. They were thereupon summoned and convicted.

Now, if these convictions are right, they can only be sustained under ss. 43 and 74 of the Act. I am of opinion that they cannot be sustained. The 70th section provides that "the rates shall be paid in advance by equal quarterly payments." This is a provision for the protection of the undertakers, and seems to shew that the legislature intended that the rate should be a personal liability, and should not attach to the property. I think, therefore, to use the words of the Lord Justice, that there is no lien in respect of any arrears of rates. Sect. 74 enacts that, if any person supplied with water neglect to pay the water-rate, the undertakers may stop the water from flowing into the premises, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit. Sect. 43 provides that, "if the undertakers neglect or refuse to furnish any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of 10*l*.," and be subject to a further penalty of 40*s*. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply. Now, the important question in this case is, what is the meaning of "any owner or occupier entitled under this or the special Act to receive a supply of water?" Is it a person whose supply of water has been cut off for non-payment of rates? I do not think that is the meaning. I think that section refers to a case of improper refusal and neglect where the communication is intact and has not been interrupted by any misfeasance by the party claiming to be entitled. In such a case, it may not be unreasonable that the undertakers should be subjected to penalties for withholding the supply. It is not immaterial to consider what would be the effect of a different construction of the section. An occupier might neglect to pay, and, after the undertakers had availed themselves of their power under s. 74 to cut off the supply, might tender the rate and then call upon the undertakers to incur the expense of

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Lopes, J.

re-connecting it. It may be that this construction of the Act may impose some hardship upon the owner or occupier who has by no neglect or default of his own been deprived of the supply; because there are no means, at least no direct means, provided in the Act by which he can compel a re-supply. That seems to have been overlooked when the Act was passed. But the position of the occupier is not irremediable. He may begin de novo, as suggested by the Lord Justice. For these reasons, I agree in the conclusion at which he has arrived. The conviction must be quashed.

Conviction quashed; leave to appeal in Wilkinson's case granted.

Solicitors for appellants: *Pitman & Lane, for R. Blakelock Smith, Sheffield.*

Solicitor for respondents: *Higgin, for Clegg & Sons, Sheffield.*

RHODES *v.* THE LIVERPOOL COMMERCIAL INVESTMENT COMPANY.

June 10.

County Court—Motion for New Trial—Appeal—13 & 14 *Vict.* c. 61, s. 14—38 & 39 *Vict.* c. 50, s. 6—*Order under* 19 & 20 *Vict.* c. 108, s. 43.

Where at the trial of a cause in a county court without a jury, the judge actually took a note of the evidence, but was not required to make a note of any question of law raised at the trial, or of the evidence in relation to it:—

Held, that the unsuccessful party could not appeal by motion, under 38 & 39 Vict. c. 50, s. 6, though he applied for a copy of the judge's notes immediately after the judgment, and his ground of appeal was that there was no evidence to warrant the decision of the judge:

Held, further, that after an appeal by motion had been rejected, for the reasons above stated, a rule calling on the county court judge to state and sign a special case, under 13 & 14 Vict. c. 61, s. 15, would not be granted.

5 CPD 14
5 QBD 30
5 CPD 31
9 QBD 38
392

THIS was an action brought in the county court of Yorkshire holden at Bradford, by the plaintiff, trustee in liquidation of Joseph Hanson, against the Liverpool Commercial Investment Company, Limited, to recover a sum of 29*l.* 6*s.* 2*d.* as having been paid to them by the debtor by way of fraudulent preference. The cause was tried before the judge of the Bradford county court, without a jury, on the 13th of April, 1878. The facts were as follows:—

The debtor, Hanson, was indebted to the defendant company in the sum of 29*l.* 6*s.* 2*d.* for instalments in arrear on a promissory-note for 40*l.*, dated the 15th of November, 1877, and payable by monthly instalments, being 3*l.* 19*s.* 5*d.* for arrears of the monthly instalments, and 25*l.* 6*s.* 9*d.* for the balance of the principal. At the time of the advance the company deducted from the 40*l.* the sum of 3*l.*, being interest at 7½ per cent. for the time the note had to run. Edward Taylor and David Kaye were sureties for the due payment of the note by the principal debtor. Finding himself to be hopelessly insolvent, Hanson towards the end of March, 1878, sold upon a valuation the whole of his assets, dividing the proceeds amongst certain of his creditors, paying to the agent of the defendants (amongst others) on the 13th of April the two sums of 3*l.* 19*s.* 5*d.* and 25*l.* 6*s.* 9*d.* above mentioned, without any pressure on their part. On the 18th Hanson filed his petition for liquidation under 32 & 33 Vict. c. 71, s. 125, and the plaintiff was duly appointed trustee. It did not appear that the agent of the defendants when he received the money was aware of the debtor's state of insolvency: but the debtor himself stated at the trial that he paid it at the request of his sureties (one of whom accompanied him to the defendants' office), and for the purpose of relieving them from their responsibility on the note.

The learned judge gave judgment for the plaintiff for 25*l.* 6*s.* 9*d.* on the presumed authority of *Marshall* v. *Lamb* (1), and on the ground that under the circumstances he conceived the payment to be a fraudulent preference, and not within the protection of the proviso in s. 92 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71.

After the learned judge had delivered his judgment the advocate for the defendants asked him for a copy of his notes. Although he commented at some length upon the evidence, and cited the case of *Butcher* v. *Stead* (2), it did not appear that the defendants' advocate had asked the judge to take a note of any question of law intended to be raised. The "notes," therefore, merely consisted of the evidence given by the plaintiff, the debtor, and the agent of the defendants.

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(1) 5 Q. B. 115.

(2) Law Rep. 7 H. L. C. 839.

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Nov. 29, 1878. *Crump*, for the defendants. Upon the facts disclosed in the judge's notes the plaintiff was not entitled to a verdict.

[GROVE, J. If the balance of evidence is in favour of the defendants, that is matter of fact. If there was *no* evidence to justify a verdict for the plaintiff, that is matter of law. We cannot grant a new trial upon a question of fact: that is settled by the case of *Cousins* v. *Lombard Bank.* (1)]

There was no case for the jury upon the plaintiff's evidence.

[LORD COLERIDGE, C.J. No point of law seems to have been taken at the trial. Assuming the judgment to be all wrong, it only amounts to a statement of the reasons upon which the judge founds his decision of a matter of fact.]

There was no evidence to warrant the judge in holding the payment to have been a fraudulent preference, as he seems to have done. It was simply and purely a question of law.

[LORD COLERIDGE, C.J. The defendants should have taken the point clearly and definitely, and asked for a nonsuit. That they did not do. Sect. 6 of the County Court Act, 1875 (38 & 39 Vict. c. 50), makes it a condition of a party's right to avail himself of an appeal by way of motion that the judge be requested "to make a note of any question of law raised at the trial, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause." (2) We can only deal with the judge's notes as they stand.]

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(1) 1 Ex. D. 404.

(2) 38 & 39 Vict. c. 50, s. 6: "In any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been or given, to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case,—such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings, as to the Court to which such motion shall be made shall seem fit: and, if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers: and at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding; and he shall, at the

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Until the judgment was delivered, the defendants could not know the grounds of the decision, they could not anticipate that there would be anything to object to.

LORD COLERIDGE, C.J. I think it is important both for this Court and for the county court, and for the suitors too, that we should hold strictly and steadily to the law as enacted in the earlier County Court Act of 13 & 14 Vict. c. 61, and in 38 & 39 Vict. c. 50, s. 6, which has been held merely to alter the former Act so far as procedure is concerned. Now, it is clear by the very terms of it that 13 & 14 Vict. c. 61 (1) did not give an appeal from the county court on matters of fact, that is, where the judge gives what the learned judges in the case of *Cousins* v. *Lombard Bank* (2) called a verdict; but, when he pronounces a decision on a case where both law and fact are submitted to him —if the parties choose, as they have a perfect right to do, to forego a jury—the legislature has said that there shall be an appeal in the mode provided by 38 & 39 Vict. c. 50, s. 6. That mode is this, the party objecting to the ruling or decision of the county court judge must distinctly raise the point of law he intends to rely on, and distinctly ask the learned county court judge to take a note of the question of law so raised and of the facts in evidence in relation thereto, and of his decision thereon, so that there may be on the discussion in the Court above a note upon which the Court may safely act. That seems to me to be clearly the rule laid down in that

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expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons; and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal."

(1) Sect. 14. "If either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of common law at Westminster . . . . And the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of such appeal as such Court may think proper: and such order shall be final."

(2) 1 Ex. D. 404.

section. It appears to me that that procedure has not been followed in this case. No affidavit has been produced; but it appears from the somewhat imperfect information presented to us that the case came before the judge for his determination on the true effect of certain undisputed facts. Those facts were put in evidence; and at the end of the plaintiff's case, the advocate for the defendants did not submit that no case had been made out against them, and ask for a nonsuit; but he proceeded to argue on the facts: nor did he ask the judge to take a note of "any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the case." I am therefore of opinion that the course of procedure prescribed by s. 6 of 38 & 39 Vict. c. 50 has not been followed, and that, upon the authority of *Cousins* v. *Lombard Bank* (1), this motion must be refused.

GROVE, J. I think Mr. Crump has not brought this case within the 6th section of the County Courts Act, 1875. Even if our attention had not been called to the case of *Cousins* v. *Lombard Bank* (1), by which decision we are bound, I should still have been of that opinion. It was there held,—and, though I was a party to that decision, I take leave to say properly held,—that the Court of Appeal from inferior Courts has no power under 38 & 89 Vict. c. 50, s. 6, to review the decision of the judge of a county court upon a question of fact arising in a suit brought within its jurisdiction as a court of common law. My Brother Field there cited a case of *Sharrock* v. *London and North Western Ry. Co.* (2), where it was held that, under s. 14 of the earlier County Courts Act of 13 & 14 Vict. c. 61, the appeal as matter of right was limited to matters of law or the improper admission or rejection of evidence. The 38 & 39 Vict. c. 50, s. 6, which introduces a new mode of procedure, superadds a requirement that the judge shall at the hearing, if asked, take a note of the particular exception made to his decision, and of the facts in relation thereto. The object of that enactment, as is stated in *Cousins* v. *Lombard Bank* (1), is, to prevent that which would work manifest injustice, viz. persons taking their chance of the decision of the

(1) 1 Ex. D. 404.

(2) 1 C. P. D. 70.

county court judge being in their favour, and afterwards, on finding the decision against them, taking advantage of a mistake in some point of law to which the attention of the judge had never been called. I therefore think, both upon principle and upon the authority of *Cousins* v. *Lombard Bank* (1), that we ought not to entertain this motion.

Motion dismissed.

June 20, 1879. *Crump*, moved for a rule, under 19 & 20 Vict. c. 108, s. 43 (1), calling upon the judge to shew cause why he should not settle and sign a special case. He submitted that, under 13 & 14 Vict. c. 61, s. 15, the judge was bound to settle and sign the case, and had no discretion in the matter: *Irving* v. *Askew.* (2)

Lane, contrà, contended that the defendants having already unsuccessfully moved for a new trial under 38 & 39 Vict. c. 50, s. 6, it was not competent to them now to have recourse to the alternative of appeal by special case under 13 & 14 Vict. c. 61, s. 14. Sect. 6 of the later Act gives the party dissatisfied with the ruling or decision of the county court judge power to appeal by motion to the superior Court, "instead of" by special case. Having adopted the one alternative, and failed, the party cannot have recourse to the other.

Crump. The application to this Court on the 29th of November, 1878, was a mere abortive attempt to make a motion.

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(1) "No writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office: but any person requiring such act to be done may apply to any superior Court *or a judge thereof* (a), upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shewn, the superior Court, or judge thereof, may by rule or order direct the act to be done; and the judge or officer of the county court, upon being served with such rule or order, shall obey the same, on pain of attachment: and, in any event, the superior Court, or the judge thereof, may make such order with respect to costs as to such Court or judge shall seem fit."

(2) Law Rep. 5 Q. B. 208.

(a) This part of the clause is repealed by s. 4 of the County Courts Act, 1857, 21 & 22 Vict. c. 74.

The defendants not having brought themselves within s. 6, were not allowed to move.

[GROVE, J. The judge not having been asked to take a note, we held on that occasion, upon the authority of *Cousins* v. *Lombard Bank* (1), that the defendants had no materials to enable them to appeal under s. 6, and therefore we declined to entertain their application. But it was as complete a motion as could be.]

The defendants clearly understood that this course was still open to them.

GROVE, J. I am of opinion that this is not a case in which we ought in the exercise of our discretion to order the learned county court judge to sign the special case. The Defendants deliberately elected to take one of two alternative remedies, and failed by reason of their advocate's omission to comply with the requirements of the statute of 1875. They came to the Court with insufficient materials, and without any excuse or explanation· I do not think it is the duty of this Court to assist suitors in continuing their litigation under such circumstances.

LOPES, J. It is unnecessary in this case to place any construction upon s. 6 of the County Court Act, 1875, or to determine whether or not there may be an appeal under the provisions of 13 & 14 Vict. c. 61, ss. 14, 15, after an unsuccessful application to the Court or a judge under the Act of 1875. The granting a mandamus, or a rule or order in the nature of a mandamus, is always matter of discretion: and I think the right exercise of our discretion in this case will be to dismiss this application, with costs.

Motion dismissed.

Solicitors for plaintiff: *Layton & Jaques, for Watson & Dickons, Bradford.*

Solicitors for defendants: *Norris, Allens, & Carter, for Terry, Bradford.*

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(1) 1 Ex. D. 404.

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June 19.

TURNER *v.* HEYLAND.

Practice—Costs—Power of Judge, without Application, to disallow Costs at Trial—Order LV., rule 1—*Salford Hundred Court of Record Act,* 1868 (31 & 32 *Vict. c. cxxx.*), *s.* 91.

CPD 28
30 31,
4 BD 662

At the trial of an action by a jury the judge may, without any application having been made to him, order under Order LV., rule 1, that the costs shall not follow the event.

Appeal from the Salford Hundred Court of Record. An action having been brought for 42*l.*, the price of work and materials; the defendant paid 23*l.* into court, and defended for the rest of the claim.

The plaintiff obtained a verdict for 7*l.*, in addition to the sum paid in. The counsel for the defendant had left the court before the verdict. The plaintiff asked for judgment, and the judge directed that judgment should be entered for the plaintiff for 7*l.* beyond the sum paid in, but that each party should pay his own costs.

The plaintiff subsequently wished to argue the question whether he was not entitled to costs, but the judge declined to hear him.

A rule nisi having been granted in the Common Pleas Division to enter judgment for the plaintiff for 30*l.* simply, or to amend the judgment by striking out the direction as to costs, on the ground that no application was made or cause shewn at the trial why the judge should otherwise order under Order LV., rule 1, of the Judicature Act, and that the judge had no discretion as to costs, and that the costs should have followed the event,

Bigham, shewed cause. First. This rule is moved under the provisions of the Salford Hundred Court of Record Act, 1868, s. 91, but being merely in fact an application as to costs, is not justified by that section. (1)

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(1) By 31 & 32 Vict. c. cxxx., the Salford Hundred Court of Record Act, 1868, s. 18, the judge of that Court has all the powers possessed or exerciseable by a superior Court or a judge thereof.

By s 91 "Any party to a suit in the Salford Hundred Court dissatisfied with any verdict or judgment given, or any nonsuit entered against him, may apply within one month to any of the superior Courts for a rule to

Secondly. The Rules and Orders made under the Judicature Act have been formally adopted for the Salford Hundred Court. The judge had therefore power to make the order as to costs under Order LV., rule 1. The defendant may indeed rely on a sentence in the judgment of Brett, L.J., in *Baker* v. *Oakes* (1), that "no application was made at the trial, and therefore the judge could not make the order, a condition precedent to giving him jurisdiction not having been fulfilled." (2) But the Lord Justice was speaking with regard to the case then before him in which the order was made, not at the trial, but at chambers afterwards. The intention of the rule is only that the question of costs shall be dealt with at the time when the case is fresh in the mind of the judge. It cannot be contended that a specific application was necessary. Orders, which are not those asked for, are constantly made at chambers. Suppose a learned judge had intimated plainly that he intended to deprive a party of costs, it would be an idle form to apply to him to do so. From the tenor of the judgment in *Bowey* v. *Bell* (3), it would seem that an order may be made under Order LV., rule 1, at the trial without any previous application. By s. 18 of the Salford Hundred Court Act the judge in that Court has all the powers of a judge of the superior Courts. If he had jurisdiction the Court will not reverse his exercise of it as to costs. If he had not jurisdiction his order was a nullity, and the plaintiff should have disregarded it and taken his costs in for taxation. The Court can entertain an application now to make the same order.

R. Henn Collins, in support of the rule. First. The order was

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shew cause why a new trial of such action should not be granted, or nonsuit set aside and a new trial granted, or a verdict entered, or judgment for the plaintiff or defendant, or a nonsuit entered, as the case may be, and the superior Court may grant such rule, and hear and determine the merits of the same, and make it absolute"—certain conditions having been fulfilled.

By Order LV., rule 1, it is "Provided that where any action or issue is tried by a jury, the costs shall follow the event unless, upon application made at the trial, for good cause shewn, the judge before whom such action or issue is tried or the Court shall otherwise order."

(1) 2 Q. B. D. 171; 46 L. J. (Q.B.) 246.

(2) 2 Q. B. D. at p. 175.

(3) 4 Q. B. D. 95.

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good until set aside or varied, and the present motion is right in form. It is made to the proper tribunal, and is authorized by sect. 91 of 31 & 32 Vict. c. cxxx.

Secondly. By Order LV., rule 1, the costs follow the event unless, first, "upon application made at the trial," secondly, "for good cause shewn," the judge shall otherwise order. An application is one condition precedent. Cockburn, C.J., evidently thought so, and Brett, L.J., expressly said so, in *Baker* v. *Oakes.* (1)

The plaintiff ought to have his costs; he recovered a substantial sum in a court of small jurisdiction.

GROVE, J. The only doubt I have in this case (save as to the Salford Hundred Court Act), is whether the decision of the Court of Appeal was really a decision that a substantive application is necessary, before the power of the judge to make an order to prevent costs following the event under Order LV. of the Judicature Act, can be exercised. I am of opinion that the judgment of the Court of Appeal did not go to that extent. The case did not require that it should, for the judge there had made no order, and so the matter had passed without any application by the parties interested, the learned counsel being absent, and the defendant, although present, being probably ignorant of the law or of the power of the judge over the costs. Lord Justice Brett is indeed reported to have said, after reading the proviso of Order LV.: "I am clearly of opinion that the case is not brought within that proviso; no application was made at the trial, and therefore the judge could not make the order, a condition precedent to giving him jurisdiction not having been fulfilled." Certainly, if that sentence were taken alone it would seem to be an intimation of the opinion of the learned judge that an application at the trial was a condition precedent. But when we examine the facts of the case and the language of the Lord Chief Justice, who does not use any words so strong, and when we look farther at the facts of some other decisions of the Courts entertaining the question, I think the real meaning of the learned Lord Justice was that nothing having been done at the trial—no application made, and the matter allowed to pass—the judge had not power to make an order at

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(1) 2 Q. B. D. 171; 46 L. J. (Q.B.) 246.

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TURNER v. HEYLAND.

chambers, and the only tribunal having that power was the Divisional Court. Such was certainly the good sense of the judgment, for the meaning of the proviso "unless upon application made at the trial, the judge shall otherwise order," is, unless the matter be dealt with at the trial. It is that—the matter may not be postponed sine die, or for an indefinite period, but—the application must be made at the trial. We must have regard to the subject-matter on which the judgment was pronounced and construe the judgment accordingly. I say this, because I am most anxious to defer wholly and fully to the judgment of the Court of Appeal. Nor in a case in which my own opinion might differ from it, would I use any subtlety of argument to escape from the authority of a judgment with which I might not agree. If I thought the Court of Appeal really meant to hold that an application at the trial was a condition precedent of the order, whatever my own opinion might be, I should not cavil at but submit to their judgment. But I do not think that such was their meaning. But the substance of ~~them~~ is, if the matter be not dealt with at the trial the judge is functus officio. Strong reasons in favour of that construction may, I think, be discovered for that in the words of the section and the decision of the Court of Appeal. It is quite clear that, if we are to construe Order LV. rule 1 with literal strictness, and the words "upon application made at the trial" create a condition precedent, it is one which applies equally to the Court as to the judge. If the rule is to be so construed the Divisional Court could not entertain the question of disallowing costs at all. But the Divisional Court has entertained the question, although no application as to costs was made at the trial. Therefore, an application made at the trial cannot be a condition precedent both to the judge exercising the power and to the Court exercising the power, and as the words of the rule apply to both, some other than the literal construction must be put on it, for, if not, it would be inoperative in many cases where it ought to have effect. Suppose, for example, a judge leaves the court after summing-up, and the verdict is received by the officer, then the application could not on such a construction of the rule be made, for the trial is over and an application even so soon as next day would not do. Again, suppose counsel were taken ill and left the court, the application could not be made because he was unavoidably absent. Again, suppose that a defendant in person who could not be expected to know the law, or the necessity of an application at the trial, made no application, and the judge thought it a preposterous action, although the plaintiff might, technically speaking, be entitled to a farthing, the judge must wait for an application by a person ignorant of the 55th section of the Judicature Act, and therefore unlikely to apply. Such a reading of the section would get rid of a beneficial power vested in the judges and defeat the intention of the legislature. I am of opinion that the judgment in *Baker* v. *Oakes* (1) was not intended to apply to cases where the judge had exercised the power at the trial, although the defendant's counsel had not gone through the form of making an application, and that the words used by the learned judges in the Court of Appeal have reference only to the case itself, in which neither an application nor an order was made at the trial. With respect to the other point, I have much doubt whether the case is not a casus omissus in the Salford Hundred Court Act. Probably the legislature only contemplated ordinary cases of changing the result of the trial by entering judgment, or a nonsuit, or otherwise, and s. 91 may not apply to interlocutory applications dealing with the costs of the case. I should hesitate long before holding that the section did not apply to interlocutory applications, but it is not necessary to decide it. Looking at the substance of the case it is an application to us to review the exercise of discretion of the learned judge as to costs.

LOPES, J. This case has raised a question of some general importance. The question is, can a judge sitting at Nisi Prius of his own motion and without any direct application to him, make an order preventing the costs following the event? It appears that after the verdict application was made to the judge to direct judgment. Nothing had been said as to costs. But the judge appended to his order for judgment an order that each party should bear his own costs. I do not hesitate to say that I should have thought that the learned judge could, without any application made to him, make such an order, except for the observations in *Baker* v. *Oakes.* (1) They are no doubt strong, especially those of Brett, L.J. But it is most material to bear in mind what was then before the Court. In that case not only had no application been made at the trial, but the subject had never been mentioned, and nothing had been done. That seems to me to make a very material difference. I come to the conclusion that what was really intended to be decided was, that there should be no jurisdiction in the judge to deprive of costs, unless his power was exercised at the time. I cannot think the Court of Appeal intended to say that, if the plaintiff recovered damages by some mere accident of litigation, and had misconducted himself, and the judge thought he ought not to have costs, nevertheless the learned judge should be prevented from exercising his salutary powers under Order LV., rule 1, solely because no application was made to him. I do not think that such was the intention of the legislature, nor that Brett, L.J., by his language, ever intended that which has been contended for to-day.

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(1) 2 Q. B. D. 171; 46 L. J. (Q.B.) 246.

With respect to the second point, I agree with Grove, J., on the 91st section of the Salford Hundred Court Act. The rule should be discharged.

Leave for appeal being asked for,

GROVE, J. I think, having regard to the words "condition precedent," in the judgment of Brett, L.J., it would be desirable to obtain the opinion of the Court of Appeal as to what they intended by them. It is most important that this should be decided. We therefore give leave to appeal.

Rule discharged.

Solicitors for plaintiff: *Paddison, Son, & Titley.*
Solicitors for defendant: *Pritchard, Englefield, & Co.*

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(1) 2 Q. B. D. 171; 46 L. J. (Q.B.) 246.

1878
July 3.

FOSTER *v.* WRIGHT.

Several Fishery—River—Gradual change of Course—Encroachment—Exclusive right to fish over new Bed of River.

The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining, the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there:—

Held, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land.

MOTION FOR JUDGMENT. (1)

Action to try the right of fishing in part of the river Lune.

The claim alleged that the plaintiff was the owner of the Camp House Farm abutting on the river, and of the whole bed of the river abutting on the farm; that he also claimed in the alternative a several fishery, and likewise in the alternative, a free fishery in that part of the river; that he also claimed the bed of the river and the said rights of fishing as lord of the honor and manor of Hornby, which comprised the river and the bed thereof; and that the defendant had committed divers trespasses by entering upon the bed of the river and fishing therein, and preventing the plaintiff from fishing therein.

The defence alleged (inter alia), that the defendant and those whose estate he had, were the owners of the Snabhouse estate, abutting on the river, and that the grievances complained of consisted of acts of fishery and other acts done by the defendant in that part of the river lying between its shore on the Snabhouse estate (opposite the Camphouse Farm), and the middle of the bed of the river along the same part of the Snabhouse estate; the

(1) This report was postponed pending an appeal. The case came before the Court of Appeal during the last sittings, but was there settled by the parties.

defendant denied that the plaintiff was owner or possessed of that part of the bed of the river.

Issue.

At the trial before Brett, L.J., at the Lancashire Spring Assizes, 1878, it appeared that no facts were substantially disputed except as to a question of boundary, viz., the extent to which the River Lune had encroached upon the land of the defendant. Some encroachment was admitted, and the parties arranged that the question of boundary should thereafter be settled between them, and that the plaintiff should move for judgment upon the facts proved and admitted, of which those material were as follow.

The river Lune, which is neither tidal nor navigable, flows through the manor or honor of Hornby, in Yorkshire. From an inquisition post mortem taken in the thirteenth year of Edw. I., it appears that one Sir Geoffrey de Neville held the manor with the appurtenances, and that he "also held the fishery of all the waters of Hornby." The manor passed down into the possession of George Earl of Cardigan, who, in 1711, enfranchised some land in the township of Grassingham within the manor. This land, called Wood's Ayre, did not then abut on the river.

By the deed of enfranchisement the lord excepted and reserved from the grant of the premises, his seignorial rights and services, tithes, and compositions, and also all manner of free warrens. . . . Together also with free liberty of hunting, hawking, fishing, and fowling in and upon the premises or any part thereof, at seasonable and convenient times of the year. In 1780, the manor was forfeited on the attainder of its lord, Colonel Charteris, but was regranted, with free liberty of fishing in all the waters of the manor, and in 1783, came into the hands of Mr. John Marsden. His heir-at-law, after establishing his right to it in the action of *Tatham* v. *Wright* (1), sold it, and the purchaser afterwards sold it to the plaintiff, who is now the lord of the manor.

The enfranchised land, Wood's Ayre, in the township of Grassingham, came into possession of the defendant. It is adjacent to the part of the manor lands belonging to the plaintiff and in the township of Tarleton. The boundary of the townships was also the boundary between the two properties.

(1) 2 Russ. & My. 1; 1 A. & E. (Ex. Ch.) 3.

Prior to 1838, the River Lune flowed wholly within these Tarleton lands of the plaintiff. It ran parallel to the defendant's land, but land belonging to the plaintiff was between the river and the boundary of the defendant's land.

From observations made and noted on a map by a steward of the defendant's predecessor in title, it appeared that between 1838 and June, 1843, the river had by invisible progress moved sideways towards the defendant's land and was wearing away the plaintiff's land which intervened. By November, 1843, it had moved further in the same direction, and it continued to do so until it encroached to some extent upon the land of the defendant, who, in 1853, stopped further encroachment by making an embankment. As a strip of his land now formed part of the river bed he claimed a right to go upon that part to catch salmon which came there, and in assertion of such right, he committed the acts alleged by the plaintiff to be trespasses.

June 24, 1878. *Herschell, Q.C.*, and *Crompton*, for the plaintiff, moved for judgment. First, the lord of the manor has a several fishery which entitles him to maintain trespass for the acts of the defendant in going upon the bed of the river to fish. A several fishery may be held as a separate and distinct right, although exercised over the possessor's own soil. A several fishery primâ facie imports ownership of the soil: *Marshall* v. *Ulleswater Steam Navigation Co.* (1) Secondly, he has a right to fish in all the waters of the manor wherever they flow in it, and the Lune is one of them. Even a sudden and violent change in its course would not have taken away that right. A gradual change such as has taken place here certainly would not disturb it. Most rivers change their channel from time to time, and much uncertainty, inconvenience, and litigation would arise if the right of fishery in them were subject to frequent alterations because of variation in the flow of the water. The right cannot be restricted to the waters as they ran when the grant was made, for it would be impossible to ascertain their exact course at that date. Any concurrent right would be hard to define and to exercise. Could it be said that when a stream moves sideways one-tenth of its breadth the lord loses his right to fish in that tenth part of the stream which flows over a new bed? The lord of this manor has also a right of shooting over all the lands, and if he enfranchised some, but reserved that right, he could undoubtedly shoot over the enfranchised lands, and even over the deserted bed of a river where, when water flowed in it he could not practically have exercised the right. So, by analogy, when the waters of Hornby, by change of channel, enable him to fish in places where he could not previously have fished, he can exercise his right of fishery there, even though without the manor. The defendant will rely on the *Mayor and Corporation of Carlisle* v. *Graham* (1), deciding that a several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old into the new channel. But the river there was tidal, and the right was to fish in a particular part of the Eden, which left that locality and flowed into the Goat, and the owners of the right sought to exercise it in the Goat, a different stream. But the Lune has not ceased to be one of the waters of Hornby because of the slight change of course, for notwithstanding the encroachment on the enfranchised land the river still runs within the manor. Suppose even no manor existed, and the plaintiff had a several right of fishery in the Lune, he would retain his right although the river has changed its course, inasmuch as the change has been gradual and imperceptible from day to day. "If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side, it is held, 22 Ass. 93, that the proprietory continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds."—Hale, De jure Maris, cap. 1, p. 5. Of course the change becomes ultimately perceptible. But can it be said that when once it is perceived that the river has made for itself a partially new channel the right of fishery ceases?

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(1) 3 B. & S. 732. 9 Jur N.S. 988

[LORD COLERIDGE, C.J.:—May not the true view be that the right does not cease, but cannot be exercised unless the stream returns to its old bed?]

The defendant contends that the right ceases as regards so much of the stream as passes over the new bed, and in that part of the stream he claims an exclusive right of fishery. Thirdly, the deed of enfranchisement reserves the manorial right so does not aid him. [They argued as to the construction of the deed, and cited *Malcolmson* v. *O'Dea and Others* (1), but this part of the argument eventually became immaterial.]

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(1) Law Rep. 4 Ex. 361.

C. Russell, Q.C., and *R. S. Wright*, for the defendant. The first argument on behalf of the plaintiff is that by reason of the right of fishery the soil of the new bed of the river is his, and that the defendant has trespassed on it. But the defendant has not lost his property in that part of his enfranchised land now covered by part of the waters of the Lune. It is still his freehold land covered by water. There is little authority on the law applicable to the encroachment of rivers: Callis on Sewers, 51, cites 22 Lib. Ass. pl. 93; for the proposition that where the encroachment of a river was so gradual that if one had fixed his eye the whole day thereon it could not be perceived, the increasement was got to the owner of the river. But Callis omits the important qualification which is in Lib. 22 Ass. pl. 93, viz. "if this increase of water has been so stealthy that no one can perceive it, nor be able to define the increase, inasmuch as the increase has been made by process of time; as in many years and not in one year or in one day, and if certain bounds are not put and found, whereby we can perceive these increases to have been hastily made by the force of the flood, then this takes away from one lord a part of his soil, whereby the soil of the other lord becomes increased on the other side of the water, in such (case of) hasty increase no one ought to lose his soil if the river be not an arm of the sea that he have not the water with his soil. And quære, albeit, that the soil is increased by an arm of the sea, shall he lose his soil. I think that he shall not."

[LORD COLERIDGE, C.J. The last sentence probably has reference to the fact that, in the case of an arm of the sea, the adjacent landowner would not be entitled to the soil ad medium filum, inasmuch as the foreshore is the king's.]

Yes, the *Mayor of Carlisle* v. *Graham* (2) establishes that the rights of fishing do not follow the river into its new course, though public rights of navigation may. The Lib. 22 Ass. pl. 93, is authority for saying that as the encroachment of the Lune, although not visible to the eye of a man watching it for a day, can be ascertained by metes and bounds, the defendant has not lost property in the land encroached on: so also Britton cap. 33, fo. lxxxvi. (book 2, ch. 2, s. 7, Nichol's translation), Bracton Lib. 2, fo. 96. True, Abbott, C.J., in *Rex* v. *Lord Yarborough* (1), seems to adopt the passage cited from Callis on Sewers, and to somewhat disregard the point as to metes and bounds. The question there was as to alluvial deposit, and arose between the Crown and the owner of land adjoining foreshore. Therefore different considerations presented themselves. But in *Attorney General* v. *Chambers* (2), also a case of alluvium on the foreshore, the dispute was as to the time of medium high tide, and Lord Chelmsford, L.C., dealt with the question now before the Court, saying, that Lord Tenterden's opinion in *Rex* v. *Lord Yarborough* (1), is "not in accordance with the great authority upon this subject, Lord Hale," and asked when the accretion can be exactly ascertained, and "although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case?"

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(1) 10 H. L. C. 593, at p. 619.

(2) Law Rep. 4 Ex. 361.

9 Jur N.S. 1135

Although, primâ facie, the property in the river, so to speak, may be in the plaintiff, yet when it is shewn by the positive evidence of metes and bounds that the river is not all in his land but in his neighbour's land, the presumption is rebutted, and the rights must be ascertained by reference to the metes and bounds. C See per Pollock, B., in *Ford* v. *Lacey* (3); *De jure Maris.* (4) The soil encroached on still belongs to the defendant, and therefore he has committed no trespass in using it.

Secondly, the plaintiff asserts a right to fish in the Lune, wherever it may at any time run within certain limits. He must go so far as to contend that if it ran entirely through the defendant's land and outside the manor the right would not be lost. But no authority has been cited to support the proposition. Primâ

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(1) 3 B. & C. 91.

(2) 4 De G. & J. 55, at p. 71.

(3) 30 L. J. (Ex.) 351, at p. 354.

(4) Harg. L. T. pp. 5, 6.

5 Jur NS 745–8,

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facie the right of several fishery is to be exercised in some defined locality. Of course the locality may be altered by agreement or prescription, but otherwise must be that as to which the right was originally given or reserved.

The *Mayor, &c., of Carlisle* v. *Graham* (1) is a case in point for the defendant. There the diversion of the river from one course to another was gradual, and it was held that although the public rights followed the stream, the private right of a several fishery did not. There is no distinction in principle between that case and the one now before the Court. That the river was tidal does not affect the question here, which arises between private individuals. Neither Kelly, C.B., nor Bramwell, nor Channell, B.B., in their judgments suggest that where the deviation of the stream can be exactly ascertained, the owner of a several fishery has a right to follow it into the new channel.

Thirdly, even if he might in some cases have such right to follow the stream, he could not follow it into the distinct freehold of another man to which it did not apply at the time of its creation.

Lastly, when the land now belonging to the defendant was enfranchised, it ceased altogether to be parcel of the manor of Hornby, and could no longer for any purpose be deemed to be within it. His predecessor in title acquired a freehold and not a freehold sub modo as the plaintiff contends, for that would be contrary to the statute Quia Emptores.

[They cited *Sowerby* v. *Smith* (2); *Bradshaw* v. *Lawson* (3); *Bailey* v. *Stephens* (4); *Wickham* v. *Hawker* (5); *Forman and Bohan's Case* (6); *Overseers of Hilton* v. *Overseers of Bowes.* (7)]

Crompton, in reply. The *Mayor of Carlisle* v. *Graham* (1), is distinguishable from the present case. There were two channels of the Eden. A right to fish in one might well not extend to the other. The river for a space changed its identity. The Crown had no right in the land through which the Goat passed, and could not have granted a fishery there. Here the right is to fish

(1) Law Rep. 4 Ex. 361.

(2) Law Rep. 8 C. P. 514; 9 C. P. 524.

(3) 4 T. R. 443.

(4) 12 C. B. (N.S.) 91. 8 Jnh 5/064

(5) 7 M. & W. 63.

(6) Leon. 13.

(7) Law Rep. 1 Q. B. 359.

in all the waters of Hornby. The Lune is one of them. It has not lost its identity by moving a little sideways as perhaps all the waters have done since the creation of the right? Can it be said that the right is therefore lost in all of them? The original intention of the grantor surely was not to confine the right in the lord of the manor and his successors to a right of fishing in the streams exactly as they ran at the time of the grant.

Cur. adv. vult.

July 3. LINDLEY, J. The plaintiff in this case is lord of the manor of Hornby, and claims the exclusive right to fish in the river Lune between two points where that river is neither tidal nor navigable; and before the enfranchisement hereafter mentioned the river between those points was locally situate within the manor of Hornby.

This manor formerly belonged to the Crown. In the reign of Edward I. it was granted, with the right to fish in all the waters of the manor; and it remained in private hands for several centuries. In the year 1711, certain lands held of the manor, but not abutting on the river, were enfranchised, and these lands now belong to the defendant. After this enfranchisement the manor became forfeited to the Crown; but it was re-granted, with the free liberty of fishing in all its waters, to the predecessors in title of the plaintiff.

From the earliest times, the lands adjoining the river on both sides of it belonged to the lord; and such was the case both when the defendant's lands were enfranchised and when the manor was re-granted by the Crown as above mentioned. In other words, until comparatively modern times, the river did not abut on the lands of the defendant. Neither when the defendant's lands were enfranchised nor when the manor was re-granted out did any part of the river either abut on or flow through the defendant's lands. Under these circumstances, I am unable to see that the deed of enfranchisement has any bearing on the case. That deed reserved to the lord whatever rights of fishing he had in any water flowing through or bounding the lands enfranchised; but it did no more, and at the date of the enfranchisement the Lune was not one of such waters: neither did the re-grant from the Crown confer upon the grantee of the manor any right to fish in the river as distinguished from any other waters of the manor.

The counsel for the defendant suggested that the terms of the new grant did not confer on the grantee any right of fishery, except as incidental to the ownership of the land on the banks and under the river: but it was conceded that as the river was then situate the grantee from the Crown acquired such ownership; and, in the view which I take of this case, it is not material to determine whether the grantee acquired his exclusive right to fish in the river; as an incident to the ownership of the bed of the river, or whether he acquired an exclusive right to fish independently of such ownership.

Since the re-grant of the manor, the course of the river between the points above referred to has gradually changed: its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property.

I am of opinion that it does. The change of the bed of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances, I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner.

Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough* (1); and, conversely, land gradually incroached upon by water, ceases to belong to the former owner: *In re Hull and Selby Ry. Co.* (2) The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shews this to be the case. Our own law may be traced back through, Blackstone (1), Hale (2), Britton (3), Fleta (4), and Bracton (5), to the Institutes of Justinian (6), from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled: see the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost: and passages in Britton (7), in the Year Books (8), and in Hale, De Jure Maris (9) were referred to in support of this view: *Ford* v. *Lacy* (10) was also relied upon in support of this distinction. Britton lays down as a general rule that gradual incroachments of a river enure to the benefit of the owner of the bed of the river: but he qualifies this doctrine by adding, "if certain boundaries are not found." The same qualification is found in 22 Ap. pl. 93, which case is referred to in Hale, ubi suprà. But, curiously enough, this qualification is omitted by Callis in his statement of the same case: see Callis, p. 51: and, on its being brought to the attention of the Court in *In re Hull and Selby Ry. Co.* (11), the Court declined to recognize it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *Rex* v. *Yarborough* (12) are also in accordance with this view; and, although Lord Chelmsford in *Attorney General* v. *Chambers* (13) doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.* (11), which decided the point so far as incroachments by the sea are concerned.

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(1) 3 B. & C. 91; 5 Bing. 163.

(2) 5 M. & W. 327.

(1) Vol. ii. c. 16, pp. 261, 262.
(2) De Jure Maris, cc. 1, 6.
(3) Book ii. c. 2.
(4) Book iii. c. 2, §§ 6, &c.
(5) Book ii. c. 2.
(6) Inst. ii. 1, 20.
(7) Ubi suprà.
(8) 22 Ass. p. 106, pl. 93.
(9) Book i. c. 1, citing 22 Ass. pl. 93.
(10) 7 H. & N. 151.
(11) 5 M. & W. 327.
(12) 3 B. & C. 106.
(13) 4 De G. & J. 69–71.

[illegible] 745-9

Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable or non-navigable rivers: and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: De Jure Maris, p. 6. The question does not depend on any doctrine peculiar to the Royal prerogative, but on the more general reasons to which I have alluded above. In *Ford* v. *Lacey* (1), the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion, and I do not regard that case as throwing any real light on the question I am considering.

Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title.

But, supposing the plaintiff's right of fishing not to have been the consequence of his ownership of the soil,—supposing him to have had only a right to fish in the Lune,—I am of opinion that he has the same right of fishing in the river in its present bed as he had of fishing in the river in its old bed. I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose: nor is there any authority for holding them to be affected thereby. The *Mayor of Carlisle* v. *Graham* (2) is no such authority; for, in that case the old and the new beds of the river existed as two distinct beds; the new bed was not, as here, formed by the old one gradually shifting its place: then, the water gradually left the old bed, and followed an entirely new course always distinguishable from the old; whilst

(1) 7 H. & N. 151.

(2) Law Rep. 4 Ex. 361.

here, there has been and is only one bed, and its change of place has only become perceptible after the lapse of years. The physical changes are totally different in the two cases.

Whether, therefore, the exclusive right of the plaintiff to fish in the river in question is an incident to his ownership of the soil or is independent thereof, I am of opinion that he is still entitled to such exclusive right in the river as it now exists, and as it will exist if it continues gradually to change its course; and consequently I am of opinion that judgment ought to be entered for the plaintiff.

LORD COLERIDGE, C.J. I have had the advantage of reading the judgment prepared by my Brother Lindley, and I entirely concur in the result at which he has arrived. Nor should I add anything, but that I am not quite satisfied to base my conclusion so much as he does upon the proposition that the grant of the fishery, in such terms as are used in the two grants in this case, carries with it the right of the soil, and that the soil therefore of the river Lune as it varies gradually from time to time passes irrespective of the medium filum to the plaintiff. I do not say that it does not, but I am not satisfied that it does. If the whole soil over which the river Lune flowed passed by the first grant, and, after the death of Colonel Charteris, by the second to the predecessor in title of the plaintiff, I think the consequence as to gradual accretion, which my Brother Lindley draws from that premiss, does in legal reasoning follow from it. But I confess I somewhat doubt the premiss. The safer ground appears to me to be that the language as to the fishery in both the earlier and the later grants conveys what it expresses, a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, i.e., as I understand the phrase, a right to take fish in alieno solo, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been.

I agree, for the reasons given by my Brother Lindley, that the

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FOSTER v. WRIGHT.

case of *Mayor of Carlisle* v. *Graham* (1) is distinguishable from the case before us; and upon these grounds I concur in thinking that our judgment should be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *Speechly, Mumford, & Co., for George E. Mumford, Bradford.*

Solicitor for defendant: *Tahourdins & Hargreaves, for Johnson & Lilly, Lancaster.*

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nsidered. BURGESS *v.* COX. [1950]
ll E.R. 1212.

1879
May 14.

[IN THE COURT OF APPEAL.]

Considered. BURGESS *v.* COX
[1951] 1 Ch. 383

LONG *v.* MILLAR.

Statute of Frauds, s. 4—Vendors and Purchasers—Contract for Sale of Land—Receipt for Deposit signed by Vendor.

BD. 12/78
ChD 283.
56,-8-9.
0 ChD 91-7

The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:—

Held, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4.

ACTION to recover damages for breach of contract to sell land.

At the trial before Manisty, J., during the Easter Sittings in Middlesex, 1878, the following facts were proved:—

The defendant was an estate agent, and was employed by one Goddard to sell three plots of land at Hammersmith for the sum of 310*l.* Afterwards Goddard spent certain sums of money in respect of the property, and became unwilling to sell it for less than 450*l.*, but of this change in Goddard's intentions the defendant was ignorant. The plaintiff agreed with the defendant to buy the property for 310*l.*, and to pay a deposit of 31*l.* in respect of the purchase. The plaintiff signed the following document:—

"21st September, 1877.

"I hereby agree to purchase the three plots (40 feet frontage) of freehold land in Rickford Street, Hammersmith, for the sum of

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(1) Law Rep. 4 Ex. 361.

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LONG v. MILLAR.

three hundred and ten pounds, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money the sum of thirty-one pounds, and to complete the purchase and pay the balance of the purchase-money on or before the 5th day of October next.

£310	0	0	purchase-money
31	0	0	deposit
£279	0	0	balance.

George Long."

The defendant signed a receipt for the deposit paid by the plaintiff in the following form:—

"21st September, 1877.

"Received of Mr. George Long the sum of thirty-one pounds as a deposit on the purchase of three plots of land at Hammersmith.

£31 0 0. Chas. W. Millar."

Goddard, however, refused to complete the purchase for the sum of 310*l.*, and required 450*l.* as the price of the plots of land. The defendant communicated these terms to the plaintiff, and offered to return the deposit, but the plaintiff insisted upon having the plots of land at the price of 310*l.*, and after some correspondence the present action was commenced. The defendant paid into court the sum of 31*l.*

The jury found, first, that the defendant sold absolutely; secondly, that he sold as principal; thirdly, that he represented that he had authority to sell for 310*l.*; fourthly, that he actually had authority; and they assessed the damages at 70*l.* Upon these findings Manisty, J., gave judgment for the plaintiff.

The Common Pleas Division ordered a new trial, on the ground that the second finding of the jury was against the weight of evidence.

The plaintiff appealed against the order of the Common Pleas Division.

The defendant appealed from the judgment of Manisty, J.

May 8, 9. *Holl, Q.C.*, and *G. Sills*, for the defendant. Even upon the facts found by the jury the judgment of Manisty, J., cannot be supported. The contract relied upon by the plaintiff is for the sale of an interest in land, and it was not put into writing so as to satisfy the provisions of the Statute of Frauds. The only document signed by the defendant was the receipt; and even if the receipt and agreement signed by the plaintiff be read together, the name of the vendor is not disclosed. If the document signed by the defendant had been an agreement and not a receipt, the result might have been different. No price is mentioned in the receipt, only the amount of his deposit.

[BRAMWELL, L.J. Suppose that the receipt signed by the defendant had been written at the foot of the agreement signed by the plaintiff, surely that would have been sufficient. Is it not a general rule that the contract is valid, where several documents exist which can be connected together without the aid of verbal evidence?]

This case resembles *Boydell* v. *Drummond* (1), which shews that in order to constitute a valid contract where several documents exist, they must refer to one another, so that verbal evidence is only necessary to identify the documents forming the contract. In the present case the receipt does not necessarily refer to the agreement signed by the plaintiff. It was quite possible that the plots of land mentioned in the receipt might belong to different persons; it is not sufficient if it is left in doubt to what the document signed by the party to be charged refers; and upon this ground *Ridgway* v. *Wharton* (2) is distinguishable. A document is not binding which does not contain the contract intended to be concluded; *Smith* v. *Webster* (3) or contains only some of the terms arrived at: *Rishton* v. *Whatmore.* (4) The omission of the vendor's name is a fatal objection: *Williams* v. *Jordan.* (5)

[BRAMWELL, L.J. Upon these findings it must be taken that the defendant was the vendor.]

The defendant when he signed the receipt did not intend to authenticate the contract, and therefore he is not bound: *Caton* v. *Caton.* (6) The receipt does not state the name of the defendant as vendor: *Vandenbergh* v. *Spooner* (7); and it does not

(1) 11 East, 142.

(2) 6 H. L. C. 238; 27 L. J. (Ch.) 46. 4 Jur ns 173.

(3) 3 Ch. D. 49.

(4) 8 Ch. D. 467.

(5) 6 Ch. D. 517.

(6) Law Rep 2 H. L. C. 127.

(7) Law Rep. 1 Ex. 316.

contain any words shewing that the defendant intended to enter into a contract: *Eley* v. *Positive Assurance Co.* (1) The verdict was against the weight of evidence, and cannot be upheld.

Francis Turner, and *A. G. M. McIntyre*, for the plaintiff. There was a valid contract within the Statute of Frauds, s. 4. If it can be gathered from the documents that a contract had been entered into, even a refusal in writing to perform it may be a sufficient compliance with the provisions of the statute: *Bailey* v. *Sweeting.* (2) The question was whether there was evidence to go to the jury that the defendant was a principal. His signature to the receipt is evidence that he was a principal, and he is bound by the consequences of his own act. Although verbal evidence cannot be admitted to discharge a person whom the written contract declares to be liable, yet it may always be admitted to charge a person whose liability does not appear upon the face of the contract: *Higgins* v. *Senior* (3); *Jones* v. *Littledale.* (4) The principle of *Ridgway* v. *Wharton* (5) and of *Allen* v. *Bennet* (6), ought to be applied to the present case. In *Calder* v. *Dobell* (7) it was held that evidence might be given to shew that the defendant was the real principal, although he had declined to allow his name to appear in the transaction; and *Southwell* v. *Bowditch* (8) is distinguishable because it appeared upon the face of the document that the defendant was acting as agent. *Baumann* v. *James* (9) is in point, and *Jones* v. *Victoria Graving Dock Co.* (10) shews that, provided the signature be affixed for authenticating the document it is immaterial to consider why it has been affixed.

The findings of the jury may be read so as to be consistent, if the fourth be omitted, and then the defendant is found to have sold as principal, or at least to have represented that he had authority to sell for 310*l.* The order for a new trial ought to have been discharged by the Common Pleas Division.

Holl, Q.C., replied.

Cur. adv. vult.

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(1) 1 Ex. D. 88.

(2) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.

(3) 8 M. & W. 834.

(4) 6 A. & E. 486.

(5) 6 H. L. C. 238; 27 L.J. (Ch.) 46. 4 Jur NS 775

(6) 3 Taunt. 169.

(7) Law Rep. 6 C. P. 486.

(8) 1 C. P. D. 374.

(9) Law Rep. 3 Ch. 508.

(10) 2 Q. B. D. 314.

May 14. The following judgments were delivered:—

BRAMWELL, L.J. The first question to be considered is, whether there is a contract valid according to the provisions of the Statute of Frauds, s. 4. I think that, subject to the point which has been raised as to the omission of the vendor's name from the agreement signed by the plaintiff and the receipt, there is a sufficient memorandum, and it appears to me that *Ridgway* v. *Wharton* (1) and *Baumann* v. *James* (2) are in point, and are decisive. The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement, so that if he committed a breach of it he would be liable to an action for damages, or to a suit for specific performance. But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word "purchase," which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence. The facts in the present case fall within the principle of *Ridgway* v. *Wharton.* (1) With reference to that decision Page Wood, L.J., in *Baumann* v. *James* (3), made the following remarks: "In that case 'instructions' were referred to. Now, instructions might be either by parol or in writing; but it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which was produced." I may further illustrate my view by putting the following case: suppose that A. writes to B. saying that he will give 1000*l.* for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return "I accept your offer." In that case there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by B. is that made by A. without infringing the Statute of Frauds, s. 4, which requires a note or memorandum in writing. It was objected that the defendant was

4 D 256

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(1) 6 H. L. C. 238; 27 L. J. (Ch.) 46. 4 Jur. N.S. 173

(2) Law Rep. 3 Ch. 508.

(3) Law Rep. 3 Ch. 508, at p. 511.

not mentioned as vendor in either the agreement signed by the plaintiff or the receipt. As to this the defendant seems to me to be in a dilemma upon the findings of the jury, and we are bound to take them as conclusive so far as the appeal from the judgment of Manisty, J., is concerned. The defendant either was or was not the vendor; if he was, he has signed the receipt in his own name, and has made himself a party to the contract; if he was not, the jury have found that he represented himself as principal, and he would be liable for that misrepresentation.

As to the question whether there should be a new trial, I am of opinion that we cannot mould the findings and enter judgment for the defendant. There was some evidence of his liability, and I cannot say the question can be withdrawn from the consideration of the jury. It is quite another matter whether they ought to find in the plaintiff's favour.

I think that both appeals must be dismissed.

BAGGALLAY, L.J. I am of the same opinion. It is impossible to hold that the receipt signed by the defendant is sufficient if taken by itself; it does not mention the price, but merely states that the sum of 31*l.* is "a deposit on the purchase of three plots of land;" it does not state, at least in express terms, who are the vendor and the vendee. I agree that, subject to the question of the omission of the vendor's name, the document signed by the plaintiff would be sufficient to charge him. Out of these materials can a valid memorandum in writing be framed? I think it can. The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence. I think that in the present case by the words "purchase of three plots of land" the receipt sufficiently refers to the document signed by the plaintiff. Therefore the contract seems to me to be complete.

As to the appeal from the order for a new trial, I need only say that I agree with the Common Pleas Division that the findings of the jury upon the first trial were unsatisfactory.

THESIGER, L.J. The first question is whether there is a sufficient reference in the receipt signed by the defendant to allow us to

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connect it with the document signed by the plaintiff. When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway* v. *Wharton* (1); there "instructions" were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to shew that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified. In the present case the difficulty is whether there is a sufficient reference in the receipt to the document signed by the plaintiff. This document is somewhat informal, and does not contain such language as we should expect a lawyer to use; nevertheless, it contains all the terms necessary to create a valid contract except the name of the vendor; and the receipt contains the word "purchase," which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff; if we read the two instruments together, we shall not be unduly straining the law by holding that the two, taken together, form a complete contract; our decision will not go beyond the decisions in *Allen* v. *Bennet* (2) and in *Baumann* v. *James.* (3) If the two documents can be connected together, the objection fails that no vendor is named. These documents were meant to be exchanged between the parties; the one was drawn up with the intention that it should operate as a complete agreement; the other contained an acknowledgment of the payment of the deposit; they were respectively signed by the parties, both of whom, it must be taken on the findings of the jury, intended to bind themselves personally. The documents were meant to be read

Ch D 257

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(1) 6 H. L. C. 238; 27 L. J. (Ch.) 46. 4 Jur. N.S. 173.

(2) 3 Taunt. 167.

(3) Law Rep. 3 Ch. 508.

and compared with one another, and I think them sufficient to constitute a contract.

The only ground remaining to be considered is whether there should be a new trial. I think that although the defendant was an estate agent, there is some ground for saying that he intended to bind himself personally; therefore we cannot say that the findings were so utterly wrong as to enable us to enter judgment for him. There must be a new trial.

Appeals dismissed.

Solicitors for plaintiff: *Paterson, Sons, & Garner.*
Solicitors for defendant: *Dod & Longstaffe.*

[DIVISIONAL COURT.]

Jan. 14.

POTTER AND ANOTHER v. CHAMBERS.

Practice—Costs—Balance due upon Claim and Counter-claim—Action for more than 20l.—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Judicature Act*, 1873, *s.* 67.

4 Ch D. 98
292, 36
5 Q.B.D. 6
17 Ch D. 1

Where an action of contract is commenced in the High Court of Justice for a sum exceeding 50*l.*, and the plaintiff establishes his claim to the amount, but in consequence of a counter-claim being decided in favour of the defendant the plaintiff recovers judgment for a sum not exceeding 20*l.*, he is not deprived of his costs by virtue of the County Courts Act, 1867, s. 5, extended to actions in the High Court by the Judicature Act, 1873, s. 67, for the relief sought by him could not, within the meaning of the latter section, have been given by a county court.

ACTION by the plaintiffs for the price of bricks supplied in the year 1877 to the defendant at the rate of 44*s.* a thousand, claiming a balance of 114*l.* 8*s.*, after giving the defendant credit for 176*l.* paid on account. Defence alleging that the bricks were sold at the rate of 38*s.* a thousand (instead of 44*s.*), and that the balance due was only 74*l.* 16*s.* Counter-claim for 76*l.* in respect of overcharges in the delivery of other bricks by the plaintiff in 1876, and for a further sum of 33*l.* 16*s.* in respect of other bricks delivered in 1877.

Reply, denying the overcharges. Joinder of issue.

At the trial before Thesiger, L.J., at the Essex summer assizes, 1878, the jury, in answer to questions put to them, found that the price of the bricks delivered in 1877 was 44*s.* a thousand, but they found in favour of the counter-claim in respect of the 76*l.* and the 33*l.* 16*s.*, leaving a balance in favour of the plaintiffs of 4*l.* 2*s.* Judgment was given for this amount. The Lord Justice, upon application made to him, refused to make an order to deprive the plaintiffs of costs, and in Michaelmas sitting, 1878, the Common Pleas Division rejected an application by the defendant to enter the issues distributively: see *Potter* v. *Chambers.* (1) On the 27th of December the master taxed the plaintiffs their costs, overruling the objection that they were deprived of them by 30 & 31 Vict. c. 142, s. 5. (2)

Jan. 14, 1878. *Peile,* moved for a rule calling upon the master to review his taxation. The plaintiffs ought not to have been llowed their costs. Under the County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 5, which is incorporated by s. 67 of the Judicature Act, 1873, a plaintiff who recovers less than 20*l.* in an action like the present is not entitled to costs except by virtue of the certificate or order of a judge. The question what is the amount actually recovered must be decided by looking at the whole record, including the claim and counter-claim, and finding to whom the balance is due: *Staples* v. *Young.* (3)

Shaw, for the plaintiffs, was not heard.

COCKBURN, C.J. I think that the master was right. *Staples* v. *Young* (3), which is relied on by the defendant, is distinguishable, for in that case it appeared that the plaintiff had only established his claim to an amount under 50*l.*, a claim which could have been entertained by the county court, and therefore no question turned upon the meaning of the words "relief sought" as used in s. 67 of the Judicature Act, 1873. The legislature never intended to give the county courts jurisdiction to deal with cases where the sums claimed on either side were considerable, though the difference actually due might be small. The plaintiffs were compelled to have recourse to the superior Court for the purpose of establishing their claim, and they could not know for certain that the defendant would set up his counter-claim. If the set-off had been an admitted one, they might have given credit for it, and gone into the county court for the balance. But it was disputed, and the right to it was tried on the action. I think that it was not intended that the county court should have jurisdiction in a case like the present.

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(1) 4 C. P. D. 69.

(2) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, If in any action commenced after the passing of this Act in any of her Majesty's superior Courts of Record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, he shall not be entitled to any costs of suit unless the judge shall certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs.

By the Judicature Act, 1873, s. 67 the provisions in the 5th section of the County Courts Act, 1867, shall apply to all actions commenced in or pending in the High Court of Justice in which any relief is sought which can be given in a county court.

(3) 2 Ex. D. 324.

Pollock, B. I am of the same opinion. I think that the relief sought by the plaintiffs was not relief which could have been given by a county court.

Motion dismissed. (1)

Solicitors for plaintiffs: *Digby & Jones, for Digby & Evans, Maldon.*

Solicitor for defendant: *George Blagden.*

[IN THE COURT OF APPEAL.]

July 9.

CHATFIELD v. SEDGWICK.

Practice—Costs—Claim exceeding 50*l.*—*Counter-claim and Set-off—County Courts Act*, 1867, *s.* 5—*Judicature Act*, 1873, *s.* 67.

The plaintiff claimed on a balance of accounts a sum of money exceeding 50*l.* The defendant pleaded a set-off, and also made a counter-claim for goods supplied to the amount of about 24*l.* The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from the defendant to the plaintiff on the claim 16*l.*, and from the plaintiff to the defendant on the counter-claim 23*l.*, and that the balance due from the plaintiff to the defendant was 7*l.*:—

Held, that the defendant was entitled to his costs.

Ante 457
4 Ex D 361
5 Ex D 181
5 QBD 569
5 CP 580-4
58 L 4, 5, 7
6 QBD 5
17 Ch D 180

Action in the Common Pleas Division by the plaintiff, a builder, against the defendant, a greengrocer, for 57*l.* 10*s.*, balance

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(1) See next case; and *Neale* v. *Clarke*, 4 Ex. D. 286.

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CHATFIELD v. SEDGWICK.

due for work done and money lent, after giving the defendant credit for 25*l.* paid on account.

Statement of defence and counter-claim, alleging that in addition to the 25*l.* the defendant had paid to the plaintiff on general account sums amounting to about 80*l.*, and claiming to set-off so much of the 80*l.* and 25*l.* as was sufficient to discharge the claim for money lent; denying that he was indebted to the amount sought to be recovered for the other items and claiming to set-off the residue of the 80*l.* and 25*l.* against them. By way of counter-claim, he alleged that he had supplied goods to the plaintiff to the amount of about 24*l.*

On the 23rd of January, 1879, it was ordered that the action be referred to the certificate of a master, under 17 & 18 Vict. c. 125, the costs of the action to abide the event, the costs of the reference to be in the discretion of the master. The master certified that there was due from the defendant to the plaintiff in respect of the plaintiff's claim the sum of 16*l.* 1*s.* 5*d.*, and from the plaintiff to the defendant in respect of the defendant's counter-claim 23*l.*, and that the balance due from the plaintiff to the defendant was 6*l.* 18*s.* 7*d.*, and he directed that the plaintiff should pay the costs of the reference. Judgment accordingly was entered up against the plaintiff for 6*l.* 18*s.* 7*d.*, and costs to be taxed. Upon taxation, the master allowed the defendant the costs of the action. An order to review the taxation was refused by Manisty, J., at chambers, and this order was affirmed by the Common Pleas Division (1). The plaintiff appealed.

Mugliston, for the plaintiff. The 67th section of the Judicature Act, 1873, does not apply so as to deprive the plaintiff of his costs, for he could not have commenced his action in a county court, the amount for which he sued being over 50*l.* He has recovered a substantial sum, and ought to have the costs of his claim: *Potter* v. *Chambers* (2), in which case the plaintiff recovered less than 20*l.*, and had his costs. The defendant's counter-claim was for less than 50*l.*, so he ought not to have the costs of it.

Horace Smith, for the defendant. A plaintiff cannot elude

(1) Ante, p. 383.

(2) 4 C. P. D. 69, 459.

s. 67 by marking his writ too high. Apart from the counter-claim he recovered less than 20*l.*, so he could not be entitled to any costs. The defendant is not bringing an action in the superior Court, and is not deprived of costs by s. 67: *Blake* v. *Appleyard.* (1) By the order of the 23rd of January, 1879, the costs were to abide the event, and the event has turned out in the defendant's favour.

JESSEL, M.R. The argument of the appellant is that if a plaintiff by his writ claims a sum exceeding 50*l.*, the 67th section of the Judicature Act, 1873, does not apply. That section provides that "the provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act, 1867, shall apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a county court." In my opinion this means where relief is sought of a kind which can be given by a county court, and does not mean where relief is sought only of such an amount as could be given by a county court. The 5th section of the Act of 1867, which is the first section incorporated, shews this, for it makes the sum actually recovered the test, and the section was incorporated for the purpose of depriving a plaintiff of costs where he recovers less than 20*l.* To hold that marking a writ with more than 50*l.* excludes the operation of s. 67 of the Judicature Act, 1873, would virtually repeal that section.

The plaintiff, a builder, sued the defendant for work done and money lent. The defendant, a greengrocer, set up a counter-claim for greengrocery supplied. It was referred to the master substantially to find which of the parties was indebted to the other and to what amount. The master found that the greengrocer owed the builder 16*l.* 1*s.* 5*d.*, and that the builder owed the greengrocer 23*l.*, so that on the whole the builder owed the greengrocer 6*l.* 18*s.* 7*d.* That was the event which the costs of the action were to abide. The greengrocer was the winning party, and ought to have his costs.

BRETT, L.J. I am of opinion that the amount for which the writ was indorsed has nothing to do with the question. The plaintiff, apart from the counter-claim, was not entitled to recover so much as 20*l.*, and therefore is deprived of costs by the Judicature Act, 1873, s. 67. What was referred to the master was, which of the parties, taking claim and counter-claim together, was the creditor and which the debtor. He has found in favour of the defendant, and this was the event which the costs were to follow.

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(1) 3 Ex. D. 195.

COTTON, L.J. I am of the same opinion on both points.

Appeal dismissed.

Solicitors for plaintiff: *Mills, Lockyer, & Mills.*
Solicitor for defendant: *T. J. Pullen.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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1 Ch. D.

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1 Q. B. D.   1 Ex. D.
1 C. P. D.   1 P. D.

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ARCHITECT—*Arbitrator, Position of—Action against, by Builder for improper Measurement and Estimation of Work—Certificate—Reconsideration of.*] Claim, that the plaintiff contracted with a company to build a hall, the plans, the bill of "quantities," &c., for which had been prepared by the defendant who was employed by the company, and named in the contract as their architect to carry out the works. The contract provided that the architect might order additions to or deductions from it, and that the amount of them should be ascertained by the architect in the same manner as the "quantities" had been measured, and at the same rate as they had been priced at; that the contractor and the company would be bound to leave all questions or matters of dispute which might arise during the progress of the works, or in the settlement of the account, to the architect, whose decision should be final and binding upon all parties, and that the contractor would be paid on the certificate of the architect. The claim then alleged that the contract was signed by the plaintiff in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff; that the work was done; that additions and deductions were ordered, and certificates given by the defendant, but that he did not use due care and skill in ascertaining the amounts, and neglected and refused to ascertain them in the same manner as the "quantities" had been measured, and at the same rate, and knowingly or negligently certified for a much less sum than was the net balance payable to the plaintiff, and refused to reconsider his final certificate, by reason whereof the plaintiff was unable to obtain payment from the company of the balance.—On demurrer;—*Held*, that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie. STEVENSON *v.* WATSON - - - 148

ATTACHMENT OF DEBT—Money paid into county court by judgment debtor 130
See COUNTY COURT. 4.

BALLOT ACT, 1872 (35 *&* 36 *Vict. c.* 33), *s.* 4—*Communicating Information as to Votes before Close of Poll—Personating Agent—Information charging more than one Offence—Jervis's Act,* 11 *&* 12 *Vict. c.* 43, *s.* 10.] By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4, every officer, clerk, and agent in attendance at a polling-station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station.—An information was laid against the respondent under the above section, charging that he, being a per-

BALLOT ACT, 1872—*continued.*

sonating agent duly appointed and in attendance at a certain polling-station in connection with a municipal election for a town-councillor, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate before the poll was closed to a certain person or persons certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot-papers or voted at that election. It appeared that the respondent, having been appointed personating agent, as stated in the information, attended at the polling booth with a copy of the burgess-roll, and remained there some hours placing a mark against the name of each voter who obtained a ballot-paper, and then before the close of the poll left the station taking with him his copy of the burgess-roll, which he left in the committee-room of the candidate by whom he was employed. There was no proof that the copy of the burgess-roll was seen by any person while in the room:—*Held*, that there was not sufficient evidence to warrant a conviction under the above section, as there was no proof that the information as to the voters was actually communicated to any person, and it was not enough that the means of acquiring such information were afforded to any one.—*Quære*, whether, under 11 & 12 Vict. c. 43, the information was defective as being for more than one offence? STANNANOUGHT *v.* HAZELDINE [191

BASTARDY—*Application for Summons by a Married Woman—35 & 36 Vict. c.* 65, *ss.* 3, 4.] A bastardy order under 35 & 36 Vict. c. 65 cannot be made where the mother has married since the birth of the child, and is at the time of the application living with her husband, although she took out a summons against the putative father before her marriage, and was prevented from serving it by his default. TOZER *v.* LAKE - - 322

BILL OF EXCHANGE—Acceptance in name of individual partner - - - 204
See PARTNERSHIP.

BILL OF LADING - - - 182, 283
See cases under SHIP.

BILL OF SALE—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 1—*Affidavit—Description of Residence of Maker—Change of Residence by Maker between Execution and Registration of Bill of Sale.*] The "description of the residence" of the maker of a bill of sale, required by the Bills of Sale Act, 1854, s. 1, to be stated in the affidavit filed therewith, must be his residence at the time of swearing the affidavit and not of executing the bill of sale.—*London and Westminster Loan and Discount Co.* v. *Chace* (12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314) disapproved of. BUTTON *v.* O'NEILL - - - - - - 354

BOROUGH VOTE—For Parliament - - 80
See PARLIAMENT.

BUILDER—Action against architect for negligently preparing quantities - 148
See ARCHITECT.

BYE-LAW—Validity of—Passenger travelling without ticket - - - 118
See RAILWAY. 2.

CARRIER—By railway—Ticket issued by one company—Passenger carried by another
See RAILWAY. 3. [267

CASES: *Bingham* v. *Allport* (1 Nev. & M. 389) followed - - - - 143
See DEBTOR AND CREDITOR. 2.

—— *Blake* v. *Appleyard* (3 Ex. D. 195) considered - - - - 69
See PRACTICE. 2.

—— *London and Westminster Loan and Discount Co.* v. *Chace* (12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314) disapproved of - 354
See BILL OF SALE.

—— *Staples* v. *Young* (2 Ex. D. 324) considered
See PRACTICE. 2. [69

—— *Wallis* v. *Hepburn* (3 Q. B. D. 84, n) distinguished - - - - 226
See PRACTICE. 10.

—— *Webb* v. *Bird* (13 C. B. (N.S.) 841; 31 L. J. (C.P.) 335) followed - - 172
See EASEMENT.

—— *Whistler* v. *Hancock* (3 Q. B. D. 84, n.) distinguished - - - - 226
See PRACTICE. 10.

CHANCERY DIVISION—Administration suit—Stay of proceedings in Common Law Division - - - - 186
See PRACTICE. 16.

CHURCH—*Grant—Collegiate Church—Chancel—Dedication — Dissolution of Ancient Monastic Priory — Surrender to the Crown — Re-Grant.*] The monastic priory of Arundel was suppressed or dissolved in the reign of Richard II. (about the year 1380), and a college consisting of a master or warden and twelve seculars or chaplains was by the king's licence created in its stead. The instrument of foundation contained rules or statutes for the government of the members of the college, and for the services to be celebrated "in ecclesiâ prefatâ.—The church of St. Nicolas Arundel, which, architecturally considered, was one entire building all apparently of the same date, was a "cross church," with a nave and aisles; a central tower; transcepts rather shorter than would be usual in a church of such proportions; and eastward of the central tower and transepts, a chapel (known as the Fitzalan Chapel) occupying the place commonly filled by the parish chancel; a north aisle called the Lady Chapel; and at the north-east corner a room originally a "sacristy," but which had for many years been used as a school-room, and as a place where the elections to offices in the corporation of Arundel were habitually held.—In 1511, disputes having arisen between the college and the corporation of Arundel as to the repair of "ye crosse-partes" or transepts, the bell-tower of the church, the bells and bell-furniture therein, they were submitted for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "crosse-partes" were described as going from south to north "inter chorum et navem ecclesiæ:" and the award of the Earl and Bishop was as follows,—The college are solely to repair the south transept, "quæ cancellus parochialis vulgariter nuncupatur;" the corporation and the parish are solely to repair the north transept and the whole of the nave and its aisles; and the expense of keeping up and repair-

CHURCH—*continued.*
ing the bell-tower, bells, and bell-furniture is to be defrayed by the corporation and the parish on the one part, and the college on the other part, in equal moieties.—In the 26th year of Henry VIII. (1544), the master or warden and chaplains of the college surrendered to the King "totam cantariam sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum, vel procinctum, ac ecclesiam, campanile, et cimiterium ejusdem cantariæ sive collegii, cum omnibus et omnimodis domibus, ædificiis, ortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti," &c. And in the same year the King in almost the same identical words re-granted the college and its possessions to Henry Earl of Arundel and his heirs.—Since the surrender and re-grant of 1544 no act of religious worship had taken place nor had prayers been said within the walls of the Fitzalan Chapel, with the exception of the reading of the Church of England burial service over some of the bodies which had been buried there,—those of members of the Duke's family who had abandoned the religion of their ancestors; and during the whole of that time the plaintiff and his predecessors had claimed to exclude and had in fact excluded the vicar and parishioners of Arundel from the whole of the disputed building. An iron lattice-work or grille filling the arch which would be commonly called the "chancel arch," and which apparently was as old as the building itself, and divided the part in dispute from the rest of the structure, was locked on the eastern side (there being no key-hole on the other side), and the key always kept by the Earls and Dukes. Vaults had been made and interments had taken place in the building, both in the Fitzalan Chapel and in the Lady Chapel, at the sole pleasure of the Dukes. No faculty had ever been applied for, no registration had taken place, nor had any fees been paid in respect of such vaults and interments. Against these acts of ownership exercised by the plaintiff's predecessors during more than three hundred years, there was not a single act of ownership proved on the part of either the vicar or the parishioners. The answers returned by successive churchwardens for a long series of years (from 1844 to 1875) to articles of visitation episcopal and archidiaconal, all shewed that they assumed the south transept to be the chancel of the parochial church, and the east end of the south transept to be the east end of the church:—*Held*, by Lord Coleridge, C.J., upon motion for judgment, that these facts were conclusive to shew that the building in question was not the chancel of the parochial church of St. Nicolas Arundel, but had always remained the private property of the Duke of Norfolk and his predecessors, and that a legal origin for such possession must be presumed; and that, even if the building in question could be shewn clearly to have been the parochial chancel in the fourteenth and fifteenth centuries, every presumption possible in point of law ought to be made in favour of a possession so exclusive, so old, and so unbroken. Duke of Norfolk *v.* Arbuthnot - - - 290

COMPANY—"*Promoters*"—*Metal Brokers of Mine—Fiduciary Relation—Secret Profits out of Sale to Company—Liability to refund.*] The defendants, metal brokers, having previously sold ore of an American mine on a commission of 2½ per cent., arranged with a proprietor to assist in selling the mine to a company to be raised by him in England. He was to procure the appointment of the defendants as metal brokers of the company at the usual rate of English commission, viz., 1 per cent., and he promised that the defendants should be liberally remunerated to the extent at least of 5000*l.* for their assistance, and to compensate for the loss of the higher commission. They were, as he knew, acquainted with facts detrimental to the reputation of the mine, and he promised the liberal remuneration to ensure their silence respecting them.—The defendants assisted him in his endeavours to sell the mine to a company to be formed for the purchase of it, but left him to fix the price, get up the company, and manage all details respecting the sale. He procured the formation of the plaintiff company and the purchase by it of the mine for 100,000*l.*, half to be paid in cash and half in paid-up shares. The defendants were appointed metal brokers of the company at the 1 per cent. commission, allowed themselves to be named in the prospectus as being ready to answer any inquiries relating to the mine, and answered such inquiries, but kept silence with respect to the detrimental facts known to them. Payment having been made for the mine to the proprietor, 250 fully paid-up shares out of those received from the company were transferred by him to the defendants, and were subsequently sold, and the proceeds received by them. This transaction was not disclosed to the company.—In an action to recover the proceeds as secret profits made by promoters, the judge left the question of promotership, without any definition, to the jury, who found that the defendants were promoters, and gave a verdict for the plaintiff:—*Held*, that there was ample evidence for the jury, and that the learned judge was not bound to give them a definition of the term "promoter;" that it has no very definite meaning, but involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it; and that the defendants were in a fiduciary relation to the company, and therefore liable to refund the secret profits, even although the contract of sale was not rescinded. Emma Silver Mining Company *v.* Lewis - - 396

—— Fraud of agent for company's benefit 94
See Evidence.

COMPOSITION—Agreement—Construction 379
See Debtor and Creditor. 1.

CONFLICT OF LAWS—Law of Jersey—Liability of husband for antenuptial debts of wife
See Husband and Wife. 1. [362

CORPORATION—Contract not under seal - 48
See Local Government Acts.

COSTS—Balance of claim and counter-claim 69
See Practice. 2.

—— Balance of claim and counter-claim—County Courts Act, 1867, s. 5 - 383, 459
See Practice. 4.

COSTS—*continued.*

—— Action for more than 50*l.*—Balance due on claim and counter-claim - - 457
See Practice. 3.

—— Power of judge without application to disallow costs - - - - 432
See Practice. 5.

—— Security for—Interpleader—Claimant residing abroad - - - 221
See Practice. 6.

—— Taxation — Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 19, sub-s. 2 - - - 21
See Municipal Corporation.

COUNSEL—Fees of counsel and refreshers 21
See Municipal Corporation.

COUNTER-CLAIM - - 28, 69, 457, 459
See Practice. 2, 3, 4, 11.

COUNTER-CLAIM AND SET-OFF—Claim exceeding 50*l.*—Costs - 457, 459
See Practice. 3, 4.

COUNTY COURT—*Appeal—Time for moving for Order nisi—38 & 39 Vict. c. 50, s. 6—Judicature Rules, Order LVII., rule 6.*] No leave of the Court or of a judge will avail to extend the time for moving by way of appeal against a decision of a county court, beyond the eight days limited by s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50)—Order LVII., rule 6, of the Rules of Court under the Judicature Act, 1875, applying only to the superior Courts. Tennant *v.* Rawlings 133

2. —— *Motion for New Trial—Appeal—13 & 14 Vict. c, 61, s. 14—38 & 39 Vict. c. 50, s. 6—Order under 19 & 20 Vict. c. 108, s. 43.*] Where at the trial of a cause in a county court without a jury, the judge actually took a note of the evidence, but was not required to make a note of any question of law raised at the trial, or of the evidence in relation to it:—*Held*, that the unsucful party could not appeal by motion, under 38 & 39 Vict. c. 50, s. 6, though he applied for a copy of the judge's notes immediately after the judgment, and his ground of appeal was that there was no evidence to warrant the decision of the judge.—*Held*, further, that after an appeal by motion had been rejected, for the reasons above stated, a rule calling on the county court judge to state and sign a special case, under 13 & 14 Vict. c. 61, s. 15, would not be granted. Rhodes *v.* Liverpool Commercial Investment Company 425

3. —— *Garnishee Summons — Attachment of Money in the Hands of the Court.*] The proceeds of a judgment paid into the county court are not attachable by means of a garnishee summons at the suit of a third person as "a debt," due from the registrar of the court to the judgment-debtor. Dolphin *v.* Layton - - - - 130

—— Appeal by motion—Power to order judgment to be entered—38 & 39 Vict. c. 50, s. 6 7
See Husband and Wife. 2.

—— Cause remitted for trial—Amendment of writ - - - - - 258
See Practice. 8.

COUNTY VOTE—For Parliament - - 73
See Parliament.

DAMAGES—*Measure of—Sporting Lease—Covenant to keep down Rabbits—Breach of—Damage to Covenantee's Tenant—Nominal Damages.*] A lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would during the term keep down and destroy the rabbits on the estate, so that no appreciable damage might be done to the crops thereon. Appreciable damage was done to the crops of an occupier of the land by rabbits on the estate, but the plaintiff never was under any liability to compensate the occupier for any such damage, and paid him no sum whatever in respect thereof. In an action for breach of covenant:—*Held*, that the plaintiff having suffered no damage himself, and not being in the position of a trustee for the occupier was entitled only to nominal damages. West *v.* Houghton - 197

—— Measure of, in action against solicitor 13
See Solicitor.

DEBT—Conditional promise to revive a debt under 9 Geo. 4, c. 14, s. 1 - - 63
See Limitations, Statute of.

DEBTOR AND CREDITOR—*Composition Agreement, Construction of—Payment under Pressure.*] At a meeting of the defendant's creditors, the following agreement, to which the plaintiff was an assenting party, was made and signed by all the creditors present:—"We the undersigned creditors of W. B., in consideration of 10*s.* in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."—At the time of entering into this agreement, it was known that the debtor was being sued in a county court by one P. as executor of a creditor for a small sum which was afterwards paid in full the day before the cause was ripe for trial:—*Held*, that the agreement was limited to the creditors signing it; and that, even if it were not so, the payment to P. being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void. Carey *v.* Barrett [379

2. —— *Tender—Clerk in Solicitor's Office—Refusal to receive—Implied Authority to receive—Composition on Law Costs.*] Money payable as a composition on a sum due to a solicitor for costs was tendered to a clerk in his office, who, saying that the solicitor was out, and that he, the clerk, had "no instructions," refused the money:—*Held*, per Lord Coleridge, C.J., that the clerk's statement did not amount to a disclaimer of his authority to receive the money; as he was apparently conducting his master's business in the office, such authority might be implied; and, therefore, the tender was good:—Per Denman, J., that the statement was, in effect, a disclaimer of authority; the case was, therefore, indistinguishable from *Bingham* v. *Allport* (1 Nev. & M. 398), and the tender was bad. Finch *v.* Boning 143

DECLARATION—Of risk under marine policy—Rectification - - - 166
See Insurance, Marine. 2.

DEVIATION—Assistance of vessel in distress—Liability under charterparty - 316
See SHIP. 4.

DISTRESS—Injunction to restrain landlord from levying distress - - - 120
See LANDLORD AND TENANT.

EASEMENT—*Right to Passage of Air—Action for obstructing Access of Air to Chimney of Dwelling-House—Nuisance.*] The access of air to the chimneys of a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act (2 & 3 Wm. 4, c. 71).—*Webb* v. *Bird* (13 C. P. (N.S.) 841; 31 L. J. (C.P.) 335) followed.—The plaintiff and the defendants were occupiers of adjoining houses. For more than twenty years the occupiers of the plaintiff's house had enjoyed the access of air to the chimneys of it. The defendants took down their house, and rebuilt a wall to a greater height, thereby causing the plaintiff's chimneys to smoke:—*Held*, that no action was maintainable by the plaintiff against the defendants, either on the ground that the plaintiff had acquired an easement which the defendants had interfered with, or on the ground that the nuisance complained of had been created by the defendants. BRYANT *v.* LEFEVER **C. A.** 172

EMBARRASSING PLEADING - - 25
See PRACTICE. 13; PLEADING.

EVIDENCE—*Fraud by Agent of Company for their Benefit—Knowledge of Company—Proof of other Frauds—Course of Business.*] In an action against a company to recover a sum of money obtained by them from the plaintiff, through a fraud of the defendants' agent committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge, and for the benefit, of the defendants is admissible on behalf of the plaintiff. BLAKE *v.* ALBION LIFE ASSURANCE SOCIETY - - - - - - 94

2. —— *Proceedings against Husband for maintenance of Child—Paternity of Child born in Wedlock—Evidence of Husband to prove Non-access—Evidence Further Amendment Act*, 1869 (32 & 33 *Vict. c.* 68), *s.* 3.] Proceedings by guardians of the poor before justices against a husband, to compel him to maintain a child which, although born of his wife in wedlock, he refuses to maintain on the ground that he is not its father, are not "proceedings instituted in consequence of adultery," within the meaning of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, so as to make his evidence admissible to prove non-access to his wife, and thereby bastardize the child. GUARDIANS OF NOTTINGHAM *v.* TOMKINSON - 343

EXECUTOR—Cause of action surviving to personal representative of plaintiff - - 40
See PRACTICE. 9.

—— Counter-claim against plaintiff personally and as executor - - - 28
See PRACTICE. 11.

FIDUCIARY RELATION—Secret profits out of sale to company - - - - 396
See COMPANY.

FISHERY—*Several—River—Gradual change of Course—Encroachment—Exclusive Right to fish over new Bed of River.*] The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining, the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there:—*Held*, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land. FOSTER *v.* WRIGHT - - - - - - 438

FRAUD—Of agent of company for their benefit 94
See EVIDENCE.

—— Married woman—Conveyance by - 39
See MARRIED WOMAN. 3.

FRAUDS, STATUTE OF—s. 4—*Vendor and Purchaser—Contract for Sale of Land—Receipt for Deposit signed by Vendor.*] The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:—*Held*, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4. LONG *v.* MILLAR - - **C. A.** 450

GARNISHEE—Money paid into county court by judgment debtor - - - 130
See COUNTY COURT. 3.

GAS—Negligence of gas-fitter - - 325
See NEGLIGENCE, 1.

GENERAL AVERAGE—Adjustment at port of refuge - - - - 329
See SHIP. 1.

GRANT—Chancel—Acts of ownership - 290
See CHURCH.

HIGHWAY—*Surveyor of Highways—"Wilful" obstruction of Highway—Highway Act, 5 & 6 Wm. 4, c. 50, s. 72.*] A local surveyor of highways, in repairing a road, placed stones thereon, and allowed them to remain at night insufficiently fenced and without sufficient light to warn the public against the obstruction:—*Held*, that he was properly convicted under s. 72 of the

HIGHWAY—*continued.*

Highway Act, 5 & 6 Wm. 4, c. 50, notwithstanding that he might also have been guilty of an offence under s. 56. Fearnley *v.* Ormsby - 136

HUSBAND AND WIFE—*Lex loci contractûs—Conflict of Laws—Liability of Husband married in England for ante-nuptial Debts contracted by Wife in Jersey—Married Women's Property Act,* 1870, *Amended Act,* 1874 (37 & 38 *Vict. c.* 50), *s.* 2.] By the law of Jersey a husband is liable for the ante-nuptial debts of his wife, and the Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50), does not apply to Jersey:—*Held,* notwithstanding, that an Englishman married in England, after the passing of the Act, to a woman who has contracted debts while a feme sole in Jersey, is liable, in an action brought against them in England for those debts, to the extent only of the assets derived from his wife and specified in s. 5 of the Act. De Greuchy *v.* Wills - - - - - - 362

2. —— *Married Woman's Property Protection Act,* 1870 (33 & 34 *Vict. c.* 93), *s.* 1—"*Earnings*" *of Wife—Business carried on* "*separately*" *from the Husband.*] A., a butcher (not within the City of London), in consequence of confirmed intemperance, became incapable of continuing his business, and was removed to the workhouse infirmary suffering from delirium tremens. On his removal, a friend at various times lent his wife sums of money to enable her to purchase meat wherewith to carry on the business for the support of her family. She continued to do so for several months, her husband on his return from the infirmary never in any way interfering, but residing for part of the time in an upper room of the house. Meat which had been so purchased by the wife was seized in execution for a debt of the husband; and upon an interpleader summons the county court judge came to the conclusion,—whether as matter of law or of fact did not appear,—that the case was not within the Married Woman's Property Act, 1870. Upon appeal to a Divisional Court, it being agreed that the Court should draw inferences from the facts stated by the judge:—*Held,* that the case disclosed such a separate trading by the wife as to warrant them in holding that the goods seized were the property of the wife. Lovell *v.* Newton - - 7

3. —— *Conveyance by—*3 & 4 *Wm.* 4, *c.* 74, *s.* 91, *and* 20 & 21 *Vict. c.* 57, *s.* 1—*Setting aside Order on the Ground of Fraud or Suppression of Facts.*] Where an order under 3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1, for the conveyance of a married woman's interest in property bequeathed to her has been obtained by fraud or the suppression of facts which ought to have been disclosed at the time,—the Court will set it aside: but a clear case must be made out. *Ex parte* Alice Cockerell - - - - - 39

—— Evidence of non-access - - 343
See Evidence.

—— Conveyance by married woman—Fraud 39
See Married Woman. 3.

INFANT—*Promise of Marriage—Ratification—Infants Relief Act,* 1874 (37 & 38 *Vict. c.* 62), *s* 2 — *Fresh Promise, Evidence of—Question for Jury.*] The defendant during his infancy made an offer of marriage to the plaintiff, which she accepted subject to the approval of his parents. He afterwards gave her an engaged ring, which she wore; and two days before he attained his majority he went into the country to visit his father, and on his return (the day after he came of age) he saw the plaintiff and told her that he had explained all to his father, and that he assented to the engagement,—adding, "Now I may and will marry you as soon as I can:"—*Held,* that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the Infants Relief Act, 37 & 38 Vict. c. 62, s. 2.—*Coxhead* v. *Mullis,* 3 C. P. D. 439, distinguished. Northcote *v.* Doughty - - - - - - 385

INFORMATION—Charging more than one offence
See Ballot Act. [191

INJUNCTION—To restrain landlord from levying distress - - - - 120
See Landlord and Tenant. 3.

INSURANCE, MARINE — *Insurable Interest — Salvage — Costs of Salvage Suit — Suing and Labouring Clause.*] The plaintiff agreed with one W. for a sum of 10,000*l.* to transport the obelisk known as "Cleopatra's Needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. He accordingly placed it in an iron case which he named *The Cleopatra,* shaped somewhat like a ship, with a small deck and a mast and steering apparatus, and engaged a steam-vessel called the *Olga* to tow it to England. To cover the expenses (about 4000*l.*) incurred by him in getting the obelisk afloat, and the cost and risk of the voyage to England, the plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandizes in the good ship or vessel called *The Cleopatra* iron vessel containing the obelisk . . . . valued at 4000*l.* . . . . against the risk of total loss only;" the risks insured against being the ordinary sea risks, and the suing and labouring clause being in the ordinary form.—In the course of the voyage *The Cleopatra* got adrift in a storm in the Bay of Biscay, and the *Olga* after some ineffectual attempts to recover her proceeded to England without her. *The Cleopatra* was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim for salvage. A suit was afterwards instituted by the salvors in the Admiralty Court, London, in which they claimed 25,000*l.* for salvage services. The Court awarded them 2000*l.* and costs. In actions upon the policies:—*Held.*—1. That the plaintiff, being the owner of *The Cleopatra,* and having possession of the obelisk, and (possibly) a lien upon it for his expenditure, had a sufficient insurable interest at least to the extent of his outlay;—2. That the true effect of both policies was, an insurance, not on "cargo" or "freight" only, but on the vessel and her cargo:—3. That, under the suing and labouring clause, the assured was entitled to recover the 2000*l.* awarded to the salvors, but not the costs of the proceedings in the Admiralty

INSURANCE, MARINE—*continued.*

Court, nor the expenses incurred by him in refitting *The Cleopatra* at Ferrol and towing her to London. Dixon *v.* Whitworth - - 371

2. —— *Reinsurance against Fire—Successive open Policies—Usage of Underwriters—Declarations of Risk—Order of—Rectification of—Negligence in declaring*] The defendants, a fire insurance corporation, agreed to reinsure the plaintiffs, a marine insurance company, against loss by fire up to 1000*l.* by any one vessel upon all coal-laden ships insured by the plaintiffs at and from certain ports to others. A policy was accordingly subscribed by the defendants whereby in consideration of 250*l.* they undertook to reinsure the plaintiffs against loss or damage by fire to the extent of 50,000*l.* by the ships as might be declared at and from certain ports to others, the policy to be subject to the same clauses and conditions (as far as they related to fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for a year, and include only coal-laden vessels, and the policy was to be supplemented by further policies on like terms should the amount of it not prove sufficient for the year's transactions. This and a second policy being exhausted by declarations of risk made under them, a third policy was applied for by the plaintiffs and issued to them. A risk, incurred prior to the date of the second policy, was not included in those declarations and was followed by a loss of cargo from fire known to the plaintiffs when the third policy issued, but, through mere neglect on the part of their manager, was not declared until afterwards. Taken in chronological order, this risk came under the third policy, if any.—In an action to recover for the loss, the Court, empowered to decide all questions in the case:—*Held*, that although the defendants had reinsured against fire only, their agreement was in respect of a marine risk and subject to the usage of underwriters stated in *Stephens* v. *Australasian Insurance Co.* (Law Rep. 8 C. P. 18), and that, therefore, the policies attached to the goods in order of shipment, and the declarations must be rectified to make them correspond with it, and this might be done even after loss; that the negligence of the plaintiffs' manager did not deprive them of their right to do it, and consequently that they were entitled to recover. Imperial Marine Insurance Company *v.* Fire Insurance Corporation - - - - - - - 166

3. —— *Right of Set-off by Insurers—31 & 32 Vict. c.* 86, *s.* 1.] In an action by the assignee of a policy of insurance, the insurers are entitled, by virtue of 31 & 32 Vict. c. 86, s. 1, to set-off a debt incurred with them by the assured for premiums on policies effected with them by the assured prior to the date of the assignment. Pellas *v.* Neptune Marine Insurance Company - - 139

INTERPLEADER—Security for costs—Claimant resident abroad - - - 221
See Practice. 6.

JOINDER—Of plaintiffs—Embarrassing claim
See Practice. 13; Pleading. [112

LANDLORD AND TENANT—*Injunction Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Restraining Distress—Terms of—Payment of Rent into Court.*] An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the Court shall think just," under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.—The terms and conditions which the Court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was paid into court. Shaw *v.* Earl of Jersey 120; C. A. 359

—— Covenant to pay rates, taxes, and charges 367
See Local Government Acts. 2.

—— Breach of covenant to keep down rabbits 197
See Damages, Measure of.

LEGACY—Money secured by mortgage—Ademption - - - - - - 336
See Will.

LIBEL—Defamatory words not set out - 125
See Practice. 12; Pleading.

LIMITATIONS, STATUTE OF—*Promise to revive a Debt under* 9 *Geo.* 4, *c.* 14, *s.* 1.—*Conditional Promise.*] In May, 1874, the defendant, in answer to a demand of a debt incurred by him, wrote to the plaintiffs as follows: "I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." In September, 1876, he again wrote: "Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." At the trial the defendant admitted that in one year since 1874 his income was greater by 14*l.* than it had been in that year; but no proof was adduced that the "general commercial crisis" alluded to the defendant's letter of September, 1876, had given way:—*Held*, affirming the judgment of Denman, J., that if the defendant's letters constituted such acknowledgments as to warrant the inference of promises to pay, they were conditional promises only, and there was no proof of the substantial fulfilment of the conditions. Meyerhoff *v.* Froehlich - - - C. A. 63

LOCAL GOVERNMENT ACTS — *Corporation — Contracts not under Seal—Local Boards, Contracts by—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 173, 174.] By s. 174 of 38 & 39 Vict. c. 55, every contract made by an urban authority whereby the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority.—The defendants, an urban authority, verbally directed their surveyor to employ the plaintiff to prepare plans for offices. The plans were prepared by the plaintiff, and the defendants advertised for tenders for building the offices in accordance therewith, but when these were sent in, it was found that the plaintiff's plans were upon too expensive a scale, and the intended offices were not erected. There was no ratification under seal of the act of the plaintiff's surveyor in procuring the plans. At the trial the jury found that offices were necessary for the purposes of the

LOCAL GOVERNMENT ACTS—*continued.*
defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed, and that the cost of the plans was 94*l.*:—*Held*, that, assuming the contract was founded on an executed consideration, the plaintiff could not recover, for s. 174 was imperative, and not directory, and applied to every contract for a sum exceeding 50*l.* entered into by an urban authority.—*Semble*, that, as the plaintiff's plans did not enable the defendants to erect the offices required by them, they had not derived such a benefit as would entitle the plaintiff to sue upon an executed consideration. Hunt *v.* Wimbledon Local Board - - - - C. A. 48

2. —— *Public Health Acts*, 1848, 1858, *and* 1875—*Sewering and Paving—Covenant to pay Rates, Taxes, and Charges.*] The defendant became tenant of a house under a lease by which he covenanted to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," land-tax, and property-tax excepted. The local board of health gave notice to the plaintiff, as owner (he having acquired the lessor's interest in the premises) to sewer, level, pave, &c., the street in which the house was situate; and, upon his failure to comply with the notice, the board did the work, and made an apportionment upon him in respect thereof, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Acts amending that Act, and he was compelled to pay the amount and interest:—*Held*, that this was a "*charge* upon the premises," or "upon a person in respect thereof," from which by his covenant the defendant undertook to relieve the plaintiff, and therefore the plaintiff was entitled to maintain an action against the defendant in respect of the money and interest so paid by him. Hartley *v.* Hudson - - - - 367

MARRIAGE—Promise of—Ratification by infant
See Infant. [385

MARRIED WOMAN—Application for affiliation order—Summons taken out before marriage. *See* Bastardy - - 322

—— Carrying on business separately from husband—Execution upon goods for debt of husband - - - - 7
See Husband and Wife. 2.

—— Married woman's reversionary property—conveyance of - - - 39
See Husband and Wife. 3.

MASTER AND SERVANT—Action by master against railway company for injury to his servant - - - - 163
See Railway Company. 1.

—— Unjustifiable sale of cargo by captain—Shipowner - - - - 283
See Ship. 3.

MEASURE OF DAMAGES—Solicitor, action against - - - - 13
See Solicitor.

MONTH, CALENDAR—Meaning of term - 223
See Time.

MUNICIPAL CORPORATION—*Corrupt Practices (Municipal Elections) Act,* 1872 (35 *&* 36 *Vict. c.* 60), *s.* 19, *sub-s.* 2—*Taxation of Costs—Master's Discretion.*] The Court will not interfere with the discretion of the master as to the amount allowed for counsel's fees and refreshers, unless it be manifest that he has failed to exercise it in a reasonable manner. Hargreaves *v.* Scott 21

NEGLIGENCE—*Article of Dangerous Nature—Contractor—Misfeasance.*] The defendant, a gas-fitter, was employed by the plaintiff's master to repair a gas-meter upon his premises, and for the purpose of doing so took away the meter and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone in the ordinary performance of his duty with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him.—The jury found that the work had been negligently done, and that the injury to the plaintiff proceeded entirely from such negligence:—*Held*, that the defendant was liable. Parry *v.* Smith - - - - - - 325

—— Action by master against railway company for injury to his servant - - 163
See Railway. 1.

—— Action against solicitor—Measure of damages
See Solicitor. [13

—— Omission to declare risk under policy 166
See Insurance, Marine. 2.

—— Railway company—Passenger carried by one company under ticket issued by another
See Railway. 3. [267

NUISANCE — Obstruction of access of air to chimney - - - - 172
See Easement.

PARLIAMENT—*Borough Vote—Payment of Rates by Owner for Occupier—Allowance of Deductions—Notice in Writing—Condition Precedent—Waiver of*—32 *&* 33 *Vict. c.* 41, *ss.* 3, 4, *sub-s.* 2, *& s.* 7.] By 32 & 33 Vict. c. 41, s. 4, the vestry of any parish may order that the owners of all rateable hereditaments of a certain value within such parish shall be rated instead of the occupiers, and thereupon: 1. The overseers shall rate the owners instead of the occupiers, and shall allow them an abatement or deduction of 15 per centum from the amount of the rate. 2. "If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated . . . . in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow him a further abatement or deduction, not exceeding 15 per centum from the amount of the rate. . . ."—By s. 7 every payment of a rate by the owner, notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purposes of the franchise:—*Held*, that the notice in writing prescribed by s. 4, sub-s. 2, is a condition precedent to a further abatement thereunder, and cannot be waived by the overseers; and, conse-

PARLIAMENT—*continued.*

quently, that where, no such notice having been given, the abatement was allowed, and a rate, minus the amount of the abatement, paid by the owner of hereditaments in respect of which it was laid, the payment could not be "deemed a payment of the full rate by the occupier" for the purpose of the franchise within s. 7 of the Act. Bennett *v.* Atkins - - - - - 80

2. —— *County Vote—Notice of Objection—Description of Qualification—Diminution of Property—Registration Act,* 1843 (6 *&* 7 *Vict. c.* 18), *s.* 40; 28 *&* 29 *Vict. c.* 36, *s.* 6.] The nature of the interest of a county voter was described in the 3rd column of the register as "freehold land," and the description of his qualification in the 4th column was "Plots 166," &c. (specifying fifteen numbers) "Victoria Estate"—The voter having parted with all the plots specified, except one, which was freehold land of sufficient qualifying value, notice of objection grounded on the 3rd column, and relating to the voter's interest, was given, and objection taken before the revising barrister that the qualification was misdescribed. He, so deciding, expunged the voter's name:—*Held*, first, that the barrister ought not to have entertained any other objection than the one of which notice was duly given; secondly, that as the identity of the property was not changed by the diminution of it he had power to amend, and should, under the circumstances, have amended the description in the 4th column by striking out the numbers of the plots which the voter had ceased to own. Smith *v.* Woolston - 73

PARTNERSHIP—*Style of—Name of Individual Member—Signature to Bill of Exchange—Liability of Firm—Evidence.*] If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm. Yorkshire Banking Company *v.* Beatson. Leeds and County Banking Company *v.* The Same - - - - - - 204

PASSENGER—By railway—Carried by one company—Ticket issued by another company
See Railway. 3. [267

PENALTY—Additional fare for travelling by railway without ticket - . - 118
See Railway. 2.

PILOT—Taken beyond limits for which he is licensed—Liability of shipbroker 216
See Ship. 5.

PLEADING.
See Practice. 11-14.

PRACTICE—*Appeal from Master—Time for—Enlargement of—Order LIV., rule* 4—*Order LVII., rule* 6—*Order LIV. rule* 1.] Within four days from the decision of a master at chambers, an appeal summons was taken out and made returnable at a date after the expiration of the four days, but on the first day when any judge would sit at chambers:—The Court *held*, that, under the circumstances, the time might be enlarged under Order LVII., rule 6, and that no summons for that purpose was necessary under Order LIV., rule 1. Gibbons *v.* London Financial Association [263

PRACTICE—*continued.*

2. —— *Costs—County Court Act,* 1867, *s.* 5—*Balance of Claim and Counterclaim—Order XIX., rule* 3.] The plaintiff claimed a balance of 114*l.* 8*s.*, and the defendant established a counterclaim to the extent of 109*l.* 16*s.*; whereupon the judge directed the jury (as the result of their answers to certain questions submitted to them) to find a verdict for the plaintiff for the balance, 4*l.* 12*s.*, and no order was made as to costs. The direction of the judge was not questioned:—The Court refused to alter the findings of the jury (the judge being unable to do so), for the purpose of giving the defendant costs upon his counter-claim.—*Staples* v. *Young* (2 Ex. D. 324) and *Blake* v. *Appleyard* (3 Ex. D. 195) considered. Potter *v.* Chambers - - - - - - 69

3. —— *Costs—Balance due upon Claim and Counter-claim—Action for more than* 50*l.*—*County Courts Act,* 1867 (30 *&* 31 *Vict. c.* 142), *s.* 5—*Judicature Act,* 1873, *s.* 67.] Where an action of contract is commenced in the High Court of Justice for a sum exceeding 50*l.*, and the plaintiff establishes his claim to the amount, but in consequence of a counter-claim being decided in favour of the defendant the plaintiff recovers judgment for a sum not exceeding 20*l.*, he is not deprived of his costs by virtue of the County Courts Acts, 1867, s. 5, extended to actions in the High Court by the Judicature Act, 1873, s. 67, for the relief sought by him could not, within the meaning of the latter section, have been given by a county court. Potter *v.* Chambers - - 457

4. —— *Costs—Claim exceeding* 50*l.*—*Counter-claim and Set-off—County Courts Act,* 1867, *s.* 5—*Judicature Act,* 1873, *s.* 67.] The plaintiff claimed on a balance of accounts a sum of money exceeding 50*l.* The defendant pleaded a set-off, and also made a counter-claim for goods supplied to the amount of about 24*l.* The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from the defendant to the plaintiff on the claim 16*l.*, and from the plaintiff to the defendant on the counter-claim 23*l.*, and that the balance due from the plaintiff to the defendant was 7*l.*:—*Held*, that the defendant was entitled to his costs. Chatfield *v.* Sedgwick - **383; C. A. 459**

5. —— *Costs—Power of Judge, without Application to disallow Costs at Trial—Order LV., rule* 1—*Salford Hundred Court of Record Act,* 1868 (31 *&* 32 *Vict. c. cxxx.*), *s.* 91.] At the trial of an action by a jury the judge may, without any application having been made to him, order under Order LV., rule 1, that the costs shall not follow the event. Turner *v.* Heyland - - 432

6. —— *Costs, Security for—Plaintiff in Interpleader—Claimants residing Abroad—Nominal Plaintiff—Security for Costs—Order LV., r.* 2.] Where a litigant who resides abroad is for mere convenience made plaintiff in an interpleader issue, but does not substantially occupy the position of the plaintiff commencing an action, he will not be ordered to give security for costs. Belmonte *v.* Aynard - - - 221

PRACTICE—*continued.*

7. —— *Costs, Security for—Interpleader Issue—Plaintiff residing Abroad—Nominal Defendant, really Plaintiff.*] Where one of the defendants in an interpleader issue is really interested in the result thereof as a plaintiff, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad.—Decision of the Common Pleas Division (4 C. P. D. 221), affirmed. BELMONTE *v.* AYNARD - - C. A. 352

8. —— *County Court—Remitted Action—High Court Pleadings—Amendment of Writ and Particulars*—30 *&* 31 *Vict. c.* 142, *s.* 10—*County Court Rules*, 1875.] When an action is remitted from the High Court under 30 & 31 Vict. c 142, for trial and the writ, and statement of claim, if any, are lodged in the county court, together with particulars given under the County Court Rules, 1875, Order XX., rule 1, the county court judge ought not to restrict the plaintiff to proof of the claim as indorsed on the writ or stated in the particulars, but should take cognizance of the statement of claim, and, if asked to do so, receive evidence in support of the allegations therein. JOHNSON *v.* PALMER - - - - 258

9. —— *Executor—"Interest" or "Cause of Action" surviving to the Personal Representative of the Plaintiff—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 38—*Rules of the Supreme Court*, 1875, *Order L., rules* 1 *and* 4.] An action was brought to recover from the promoters of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them, in breach of s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), omitted to disclose certain contracts, which ought to have been specified therein. After judgment and pending an appeal to the House of Lords the plaintiff died:—*Held*, affirming the decision of the Common Pleas Division, that under Order L., rule 4, of the Rules of 1875, the plaintiff's interest in the action survived and was capable of "transmission" to his personal representative. TWYCROSS *v.* GRANT - - - - C. A. 40

10. —— *Extension of Time limited by the Order of a Judge or Master for doing an act—Order LIV., rule* 4, *and Order LVII., rule* 6—*Consolidation of Actions.*] By the combined operation of Order LIV., rule 4, and Order LVII., rule 6, the Court or a judge has power to enlarge the time limited by an order of a master for doing an act, even after the expiration of the time so limited and the lapse of the four days' time for appealing, where the justice of the case requires it.—On the 25th of March a master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day; but, on the day following, a summons was taken out "for further time to answer the interrogatories:"—*Held*, that it was still competent to the Court or a judge to enlarge the time for moving to set aside or vary the order of the 26th of March.—*Whistler* v. *Hancock* (3 Q. B. D. 83) and *Wallis* v. *Hepburn* (3 Q. B. D. 84, n.) distinguished. BURKE *v.* ROONEY - - - - - - 226

11. —— *Pleading—Claim in Plaintiff's own right—Counter-claims against him personally and as an Executor—Joinder of improper—Order XVII., rule* 5—*Order XIX., rule* 3—*Order XXII., rule* 9.] A defendant must not set up by way of counter-claim against the claim of a plaintiff, suing only in a distinct personal character, claims against him personally and also as an executor. MACDONALD *v.* CARINGTON - - - 28

12. —— *Pleading — Claim — Libel—Defamatory Words not set out—Malicious Prosecution—Charge to Police—Demurrer—Judicature Act, Order XIX., rules* 4, 24.] A claim alleged that the defendant wrote and sent to a chief constable letters charging the plaintiff with a murder, and required his arrest; also, that the defendant sent to a superintendent of police charging the plaintiff with the murder, and required his arrest; and that the superintendent, in consequence, endeavoured to arrest the plaintiff on several occasions, but was unable to meet with him; that the defendant had no reasonable or probable cause for making the charge, and the same was false, and made maliciously and with intent to injure the plaintiff, whose credit and reputation were thereby injured.—On demurrer:—*Held*, that the claim was bad; because, if it was for libel or slander, the defamatory words were not set out, as, even in pleading under the Judicature Act, they ought to be: if for malicious prosecution, none had been instituted before a judicial officer. HARRIS *v.* WARRE [125

13. —— *Pleading — Joinder of Plaintiffs — Claim for Price of Goods and on Bills given for it—Embarrassing Pleading—Orders XVI., XVII., XXVII., rule* 1.] A claim in which the vendor of goods and the indorsees of a bill given by the purchaser to the vendor for the price jointly sue the purchaser to recover the price and also upon the dishonoured bill is embarrassing, and may therefore be struck out. SMITH *v.* RICHARDSON - 112

14. —— *Pleading—Matters of Law—Embarrassing—Order XXVII., rule* 1—*Striking out.*] Statements in pleading which are not demurrers, but allege only matters of law that might be raised by demurrer, are embarrassing, and may be struck out under Order XXVII., rule 1. STOKES *v.* GRANT - - - - - 25

15. —— *Procedure — Injunction — Supreme Court of Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Landlord and Tenant—Restraining distress, Terms of—Payment of Rent into Court.*] An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the Court shall think just," under the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.—The terms and conditions which the Court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into Court.—Decision of the Common Pleas Division (4 C. P. D. 120) affirmed. SHAW *v.* EARL OF JERSEY C. A. 359

16. —— *Procedure — Stay of Proceedings—Action to recover mortgaged Hereditaments—*

PRACTICE—*continued.*

Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5.] C., being executor of L., mortgaged certain hereditaments, which had formed part of the estate of the deceased. The plaintiff, who became mortgagee, afterwards sued to recover possession of them from her lessees on the ground of a forfeiture for non-payment of rent. C. obtained leave to defend the action as landlord. A suit had been instituted by C. in the Chancery Division to administer the estate of L., and an inquiry had been directed as to the mortgage. An order was obtained by C. staying the proceedings in the action for the recovery of the hereditaments until the proceedings in the Chancery Division should have concluded:—*Held*, that the order was bad, and must be set aside. Crowle *v.* Russell [C. A. 186

17. —— *Procedure—Order XIV., rule 6—Leave to defend—Security—Payment into Court—Judgment for Defendant—Notice of Appeal—Right to return of the Money.*] If a defendant, fulfilling the condition of an order under Order XIV., rule 6, by which he was allowed to defend an action, has brought money into court, and the final judgment of a Divisional Court be afterwards entered for him, he is thereupon entitled to the return of the money, although notice of appeal against the judgment may have been given by the plaintiff. Yorkshire Banking Company (Limited) *v.* Beatson. (2.) - - - 213

18. —— *Specially indorsed Writ—Order III., rule 6—Order XIV., rule 4.*] A writ of summons was indorsed as follows:—"The plaintiff's claim is 49*l.* 5*s.* 8*d.* The following are the particulars." It then went on "To goods," with dates and amounts, and, after giving credit for certain payments, it stated the balance due to be 49*l.* 5*s.* 8*d.*:—*Held*, a sufficient indorsement under Order III., rule 6, to entitle the plaintiff to sign judgment under Order XIV., rule 1; and that the indorsement was not vitiated by the insertion therein of a banker's draft which had been given as payment but was dishonoured, and in respect of which no claim was made. Smith *v.* Wilson - 392

19. —— *Service—Leave to serve a Defendant in Scotland—Order XI., rule 5, of the Orders of June, 1876.*] To obtain leave to serve a defendant in Scotland, it is not enough to shew the amount of the claim, that the contract was made and the breach of it occurred in London, that the plaintiff and also the agent of the defendant (who signed the contract) reside in London, that all the plaintiff's witnesses reside in London, and that it would be more convenient and less expensive to try the action in London than in Scotland. The affidavit should go on to shew in what respect, regard being had to the facilities for trying the cause in the neighbourhood of the defendant's residence, it would be cheaper and more convenient to try in London. Woods *v.* M'Innes. 67

PRINCIPAL AND AGENT—Fraud by agent of company for their benefit - - 94
See Evidence.

—— Secret profit of agent to vendor on sale of mine to company - - - 396
See Company.

PRINCIPAL AND AGENT—*continued.*

—— Unjustifiable sale of cargo by captain—Shipowner - - - - 283
See Ship. 3.

PROMOTER—Of company—Definition of term
See Company. 369

QUALIFICATION—Of county voter—Description
See Parliament. 2. [73

RAILWAY—*Master and Servant—Action by Master for Injury to Servant—Pure Tort.*] Claim alleged that the servant of the plaintiff took a ticket and travelled by the L. T. & S. Railway; that the defendants, the Great Eastern Railway Company, supplied the engines, drivers, and firemen for working the traffic of the L. T. & S. Railway, and also the signalmen for working the said traffic at the S. Junction; that the L. T. & S. train in which the servant travelled came into collision with a train of the defendant company at the junction, through the negligence of the defendants' signalman there; that the servant was hurt, whereby the plaintiff lost his services and was damnified. On demurrer:—*Held*, that the action was against independent wrong-doers, not parties to the contract of carriage, for a pure tort and could therefore be maintained. Berringer *v.* Great Eastern Railway Company - - - - - - 163

2. —— *Bye-law, Validity of—Passenger travelling without a Ticket—Penalty—Railway Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 103, 109, 145.] A bye-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey."—By s. 109 of the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), bye-laws are authorized to be made, and by s. 145 penalties for forfeitures imposed by bye-laws are recoverable before justices:—*Held*, that the above bye-law did not create a debt recoverable in a Court of civil jurisdiction. London and Brighton Railway Company *v.* Watson - - - C. A. 118

3. —— *Passenger—Ticket issued by One Company—Train of Another—Negligence—Liability of Carriers.*] The defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond station of the South Western Railway Company. Above the booking office at the New Richmond station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Railway a return ticket to Hammersmith and back. The ticket was not headed with the name of either company, but bore on it the words "viâ District Railway." On his return journey from Hammersmith to Richmond the plaintiff travelled with his ticket in a carriage of a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond station

RAILWAY—*continued.*
platform, the plaintiff, on alighting there, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—*Held*, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the South Western Company. Foulkes *v.* Metropolitan District Railway Company - - 267

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RATIFICATION—Promise of marriage by infant
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REGISTRATION—Bill of sale - - 354
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RE-INSURANCE—Against fire—Successive open policies—Declarations of risk - 166
See Insurance, Marine. 2.

RESIDENCE—Of maker of bill of sale—Description of - - - - 354
See Bill of Sale.

REWARD FOR THE APPREHENSION OF A FELON—*Criminal surrendering himself.*] G. having been guilty of forgery, absconded. The defendants published a handbill offering a reward of 200*l.* "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G."—On the 30th of November, 1877, a person presented himself at the police-office, Exeter, and asked for the chief constable (the plaintiff). On seeing him, the man (who was G.) said, "You hold a warrant for me; I am wanted for forgery." The plaintiff left the man in a private room, and, on searching the police-gazette and finding a notice therein, "W. G. wanted for forgery," telegraphed to the superintendent of police at Dewsbury, "Do you hold warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., and should like him to be apprehended," the plaintiff *apprehended* and charged the man, who was ultimately convicted.—In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:—*Held*, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice. Bent *v.* Wakefield Bank 1

RIVER—Gradual change of course—Encroachment - - - - 438
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—— Order LVII., r. 6 - - - 133
See County Court. 1.
—— —— —— - - - - 226
See Practice. 10.
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See Practice. 1.

SALE OF GOODS—*Contract, not divisible.*] The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October $^{\text{and}}_{\text{or}}$ November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading.—Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the *B.*, only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:—*Held* (by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting), that the contract was entire, and that the defendants were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons according to the contract. Reuter *v.* Sala [C. A. 239

SALE OF LAND—Receipt for deposit signed by estate agent—Personal liability - 450
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SALVAGE—Costs of salvage suit—How far recoverable under suing and labouring clause - - - - 371
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SECURITY—Money paid into court for liberty to defend - - - - 213
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SET-OFF—By insurer under marine policy - 139
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SEWERING AND PAVING—Covenant to pay rates, taxes, and charges - - 367
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SHIP—*Average Adjustment at a Port of Refuge—Pro Ratâ Freight.*] The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the ship-owner and the owner of cargo, warrant an average adjustment at the intermediate port.—To entitle a ship owner, in the absence of a special contract, to demand pro ratâ freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shewn that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port.—A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with pro ratâ freight from Riga to Copenhagen.—In an action for the price realized by the sale at Copenhagen:—*Held*, that the ship-owners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor pro ratâ freight. Hill *v.* Wilson - - - - - 329

2. —— *Bill of Lading, Clause excepting Liability for Acts of Master and Crew—Stowage, Negligence in.*] Bags of sugar shipped by the plaintiffs were carried in the defendants' steamship from H. to L. at an agreed freight. The vessel was chartered for the voyage by P. & K., who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master, or mariners in navigating the ship, and a further clause that the captain, officers, and crew in the transmission of the goods should be considered the servants of the shipper, owner, or consignee. The sugar was negligently stowed under oxide of zinc and was consequently damaged. It did not appear how the sugar came to be shipped, nor with whom the plaintiffs made the contract of carriage:—*Held*, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such a manner as to come into contact with a mischievous substance. Hayn *v.* Culliford - - - - C. A. 182

3. —— *Charterparty — Unjustifiable sale of Goods by Captain at intermediate Port—Liability of Shipowner.*] The plaintiffs wishing to send cement and stone from London to Callao, the defendants, on the 24th of June, wrote offering them "room" for it in the ship *F. K. Dumas*, and on the 25th of June the defendants chartered the ship of the owners for a voyage from London to Callao by a charterparty providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; that the ship should be addressed to the charterer's nominees at the port of discharge; and the charterer's responsibility, except for freight, was to cease on the vessel being loaded.—On the 26th of June an agreement was made between the defendants, "acting for the owners" of the ship, and the plaintiffs that the former should receive on board cement and stone at a certain freight from London to Callao and sail on a certain date. Freight to be paid one-half on signing bills of lading, and the remainder on final discharge at Callao.—The cement and stone were shipped, half freight was paid, and the master signed bills of lading making the other half payable at Callao; and the ship sailed, but being damaged by bad weather put into an intermediate port where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them.—The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified:—*Held*, that the captain, in selling the goods, was not acting as the servant or agent of the defendants, and they were therefore not liable for the conversion. Wagstaff *v.* Anderson 283

4. —— *Deviation—Charterparty.*] A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.—The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master in consideration of 1000*l*. agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost.—In answer to questions put to them by the learned judge, the jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to save the lives of those on board her; but that it was reasonably necessary to do so in order to save her and her cargo:—*Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover against the owners the value of the cargo. Scaramanga *v.* Stamp 316

5. —— *Pilotage Dues—Allowance to Pilot*

SHIP—*continued.*

carried beyond Limits of his Licence—Liability of Shipbrokers—17 & 18 *Vict. c.* 104 (*The Merchant Shipping Act*, 1854), *s.* 357.] The ten shillings and sixpence per day to which a licensed pilot, taken, without his consent, to sea or beyond the limits of his pilotage district, in any ship, is entitled by 17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854), s. 357, are not "pilotage dues" for which the shipbrokers are liable under s. 363. Morteo *v.* Julian - - - 216

SOLICITOR—*Negligence. Action for—Damages, Measure of—County Court Appeal—Entering Judgment on Appeal by Motion*—13 & 14 *Vict. c.* 61, *s.* 14—38 & 39 *Vict. c.* 50, *s.* 6.] The plaintiff, who held a mortgage for 4600*l.* upon lands belonging to one F., agreed to make him a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the 46*l.*:—*Held*, that this was negligence for which the defendant was liable; and that, in the absence of evidence to reduce the amount, the 46*l.* so paid was the proper measure of damages.—Upon an appeal by motion under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, the Court of Appeal has power to order *judgment* to be entered,—the former provision in that respect (13 & 14 Vict. c. 61, s. 14) not being repealed or varied by s. 6 of 38 & 39 Vict. c. 50, which only gives an additional mode of procedure. Whiteman *v.* Hawkins - - - 13

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TIME—*Computation of—Discharge of Prisoner after expiration of Sentence—Calendar Month, meaning of.*] A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to

TIME—*continued.*

that from which his sentence takes effect.—On the 31st of October the plaintiff was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence, he was detained in custody until the 14th of December :—*Held*, that the detention was lawful, for as the calendar month did not expire until the 30th of November, he was not entitled to be discharged from the second term of imprisonment until the full period of fourteen days computed from the 1st of December had expired. MIGOTTI *v.* COLVILL - - - - - C. A. 233

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WATERWORKS CLAUSES ACT, 1847 (10 & 11 *Vict. c.* 17)—*Right to cut off Supply of Water for Non-payment of Rates—Procedure for obtaining Restoration of Supply.*] A tenant of premises supplied by a company with water having failed to pay the water-rate, the company under the powers conferred upon them by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under s. 43 of the Waterworks Clauses Act for such refusal :—*Held*, that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by s. 43 until he himself had restored the communication with their main pipes. SHEFFIELD WATERWORKS COMPANY *v.* WILKINSON - - - - 410

WILL—*Construction of—Specific Legacy of outstanding Mortgage—Ademption.*] Testator bequeathed to his niece L. B. "the mortgage of £200 which he had secured to him on a mortgage of premises (describing them) belonging to W. H." After the making of the will and before the testator's death, the mortgage debt due to him from W. H. had been paid off :—*Held*, that the specific bequest to L. B. was adeemed, and that the fact of the testator having placed the £200 to a separate account at his banker's, and put the passbook in which that sum was credited to him in her hands made no difference. *In re* BRIDLE 336

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.